93-496

No. 93-

In the Supreme Court of the United States

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

VOLUME II
APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON

Garry P. McMurry
Garry P. McMurry & Associates
435 Benj. Franklin Plaza
One S.W. Columbia Street
Portland, Oregon 97258
(503) 228-6515

Attorney of Record for Petitioners

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VOLUME II

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IN THE COURT OF APPEALS
OF THE STATE OF OREGON

IRVING C. and JEANETTE STEVENS,	)	Clatsop Circuit Court No. 90-2061
Plaintiffs-Appellants,	)	
v.	)	Court of Appeals No. 68916
CITY OF CANNON BEACH, and STATE OF OREGON, DEPARTMENT OF PARKS & RECREATION	)	
Defendants-Respondents.	)	

APPELLANTS' OPENING BRIEF AND ABSTRACT OF OREGON

Appeal from the Judgment
of the Circuit Court
of the State of Oregon
for the County of Clatsop

The Honorable Thomas E. Edison, Judge

G60

STATEMENT OF THE CASE

I. NATURE OF THE ACTION

Plaintiffs Irving and Jeanette Stevens are the owners of the Ecola Inn in the City of Cannon Beach. Plaintiffs also own two vacant lots, north of and separated from the Ecola Inn by the Surfsand Resort Hotel. The two lots are zoned for residential/motel use. Plaintiffs applied to defendants for permits to build a retaining wall to develop their vacant lots for motel use by the Surfsand Resort Hotel.

Plaintiffs' permit applications were denied, based, in part, upon the Land Conservation and Development Commis-sion's Goals and Guidelines 18 prohibition of residential, commercial or industrial structure on Oregon's beaches and dunes, enacted in 1985.

Plaintiffs brought this inverse condemnation action against the defendants, asserting five claims for relief. Plaintiffs contend that the Land Conservation and Development Commission's Goals and Guidelines constitutes a "facial", as well as an "as applied", effect a regulation taking of plaintiffs' private property, in that such regulation deprives plaintiffs of any investment-backed expectancy of economic use of their property without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 18 of the Oregon Constitution.

II. NATURE OF THE JUDGMENT

Both defendants filed motions to dismiss plaintiffs' first, second, third and

fourth claims for relief for failure to state a claim. The first claim alleged an "as applied" taking against the City of Cannon Beach (City). The second claim alleged a facial taking against the City. The third claim alleged an "as applied" taking against the Department of Parks & Recreation (Parks & Rec.) The fourth claim alleged a "facial" taking against Parks & Rec. Defendant State also moved to strike the allegations for inverse condemnation damages and attorneys fees from plaintiffs' fifth claim for relief (A-11).

1,000 Friends of Oregon, the League of Oregon Women Voters, and the Oregon Shores Conservation Coalition filed a motion to appear as amici curiae at trial (Rec. p. 289). Plaintiffs objected (Rec. p. 304). The Circuit Court granted 1000 Friends of

Oregon, the League of Women Voters and the Oregon Shores Conservation Coalition motions to appear as amici curiae and to file a brief in support of defendants' motions to dismiss (Rec. 289).

In a letter opinion, dated July 19, 1991, the Circuit Court held that the case of State ex rel Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) stood for the rule that all beach-front owners of the "dry-sand" portion of Oregon beaches had no rights to exclude the public from the "dry sand" and, therefore, plaintiffs' inverse condemnation action was barred, as no property right was taken. Accordingly, the Circuit Court granted defendants' motions to dismiss plain-tiffs' first, second, third and fourth claims with prejudice (Ab-11-12). The Court also granted the State's motion to

strike. Plaintiffs voluntarily dismissed their Fifth Claim for relief, pursuant to ORCP 67B and May v. Josephine Memorial Hospital, 297 Or 531, 686 P.2d 1015 (1984) in order to allow final judgment upon which this appeal is made. (A-15-16). Plaintiffs appealed from the judgment of dismissal that followed (A-16-17).

III. APPELLATE JURISDICTION

The court entered judgment against plaintiffs on February 20, 1991 (A-16-17). That judgment, in combination with plaintiffs' voluntary dismissal of their fifth claim for relief disposed of all claims between the parties. Plaintiffs served and filed their notice of appeal on March 20, 1991, 28 days after entry of the judgment (A-17). This appeal is, therefore,

properly before the court. ORS 19.026(1).

IV. QUESTIONS PRESENTED ON APPEAL

(1) Did the lower court err in holding that State ex rel Thornton v. Hay, eradicated private owners' rights to any development of the "dry-sand" portion of the beach?

(2) If not, does Thornton constitute a taking of plaintiffs' property without just compensation?

(3) If the answer to either of the above stated issues is affirmative, did the lower court err in not deciding each of defendant's remaining motions to dismiss and in the interest of judicial economy should this Court decide the three pending motions to dismiss?

V. SUMMARY OF ARGUMENT

Assignment of Error No. 1

The trial court's dismissal of plaintiffs' complaint is erroneous for the following reasons:

(A) Thornton determined that the State could prevent a structure not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the dry sand of Cannon Beach.

(B) To construe Thornton as preventing all economic development of the dry-sand portion of Cannon Beach, and land similarly situated, results in an implied repeal of the Beach Bill (ORS 390.605, et seq.); a result not understood by anyone until this case.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of ancient custom of public recreational use is not applicable to the land in question in this case.

(D) If Thornton is construed to prevent all economic development of private property, it consti-tutes an unconstitutional taking of plaintiffs' property without just compensation.

Assignment of Error No. 2

The lower court erred in not ruling on all of defendants' three additional pending motions to dismiss or strike, i.e.:

(A) Plaintiffs did not adequately plead in their second and fourth claims, that the amended LCDC Goals and

Guidelines 18 constitutes a "facial" taking or per se taking.

(B) Plaintiffs' complaint should be dismissed as plaintiffs failed to exhaust their administrative remedies.

(C) Plaintiffs' claim to attorneys fees should be stricken as not being supported by statute.

If the Court reverses the dismissal of the complaint, then in the interest of judicial economy, this Court should decide the pending motions, so as to avoid another appeal. Such decision should deny each of the pending motions as plaintiffs have adequately alleged Goal 18 is a facial taking and the instant case is entitled to adjudication of "final orders", and

plaintiffs are entitled to attorneys fees and damages upon their inverse condemnation claims.

VI. STATEMENT OF FACTS

Plaintiffs own two vacant beachfront lots in the City of Cannon Beach (Tax Lots 8500 and 8501), which they have owned since 1957. Tax Lot 8500 is above and east of the statutory line of vegetation. Tax Lot 8501 lies west of the statutory vegetation line. (A-1) (See also, property survey, App.-1). These parcels have been physically improved by streets and utilities, and are located in an area identified in the local comprehensive plan of Cannon Beach as an area where development existed as of January 1, 1977 (A-1-2). Both vacant lots are zoned for residential/motel use. The lots are

located to the north and adjacent to the Surfsand Resort Hotel; owned by Mr. Steve Martin. The Ecola Inn, owned by plaintiffs, is adjacent and south of the Surfsand Resort Hotel. These lots are the only remaining vacant beach level lots zoned for residential/motel use in Cannon Beach (A-2).

Plaintiffs allege on or about July 20, 1979, plaintiffs leased both parcels to Steve Martin and Raymond Schultens (now deceased) (A-2). The parties agreed that Mr. Martin would build up to an additional 30 motel units on the vacant parcels. The lease extends for a 50-year term, and plaintiffs are entitled to lease-rental proceeds based upon the then current yearly assessed value of the property. Upon termination of the lease, ownership of any buildings on the property reverts to the

plaintiffs (A-2).

On or about January 1, 1985, the Land Conservation and Development Commission (LCDC) amended Goal 18 of the statewide land use planning Goals & Guidelines 18 (Goal 18) to require local governments and state agencies to prohibit any residential, commercial or industrial buildings on "beaches", in order to conserve and protect these areas (A-2-3).

In 1986, Cannon Beach enacted Ordinance Section 3.180 to implement Goal 18 (A-3). Section 3.180 creates an "Active Dune and Beach Overlay" zone (ADBO zone). The Ordinance, as required by amended Goal 18, prohibits all residential development, commerical or industrial buildings within this zone. The ADBO Ordinance covers plaintiffs' land in question. By state law,

Goal 18 applies to Parks & Rec. and the State Land Board.

On August 24, 1989, plaintiffs and Mr. Martin jointly applied to defendant Parks & Recreation (Parks & Rec) for a permit to build a retaining wall on the property to stabilize it for commercial development (A-6), as well as to the State Land Board for a fill permit (Rec. 196). Parks & Rec denied the permit. (A-6) The State Land Board denied the permit. (Rec. 196)

On December 18, 1989, plaintiffs also applied to defendant Cannon Beach for a permit to build a retaining wall (A-3). Plaintiffs' permit application was denied by the City Planning Commission on March 16, 1990 (A-3-4).

Each permit was denied, in part, on the legal ground that plaintiffs' property,

while zoned for residential/motel use, is subject to amended Goal 18, which prohibits all residential, commercial, or industrial development.

ASSIGNMENT OF ERROR NO. 1

The Lower Court Erred in Holding that State ex rel Thornton v. Hay, supra, Eradicated Private Owners' Rights to any Development of Their "Dry-Sand" Portion of the Beach.

I. STANDARD OF REVIEW

Plaintiffs' complaint was dismissed for failure to state a claim for relief. The standard of review is one of clearly erroneous legal ruling.

Where the issue is the sufficiency of allegations to state a claim, the allegations are taken to be true and the sufficiency of the allegations in the

complaint must be decided "upon the basis of any facts which might conceivably be adduced as proof of such allegations." Mezyk v. National Repossessions, 241 Or. 333, 336, 405 P.2d 840 (1965); DeYarman Allergy Clinic v. Adler, 75 Or. App. 141, 706 P.2d 506 (1985). When that standard is met, the dismissal is legal error.

The federal courts have held that motions to dismiss for failure to state a claim must be viewed with particular skepticism in cases involving inverse condemnation. Moore v. City of Costa Mesa, 886 F.2d 260, 262, (9th Cir. 1989), citing, Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9th Circ. 1986), cert. denied, ____ U.S. ____, 108 S.Ct. 1120, 99 L.Ed.2d

281 (1988).[1]

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[1] In *Hall v. City of Santa Barbara*, the Court stated:

> "It is axiomatic that '[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.' (citation omitted) This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court has admitted its inability 'to develop any "set formula'" for determining when compensation should be paid, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), resorting instead to 'essentially ad hoc, factual inquiries" to resolve this difficult question. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 2566-67, 91 L.Ed.2d 285 (1986); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. *See Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558-60 (Fed.Cir. 1985); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed.Cir. 1983)."

II. ARGUMENT

The trial court accepted the State's bold argument that Thornton v. Hay, supra, has extinguished all rights that a private owner of "dry sand" had to construct anything that would impair the public's right to go upon the "dry sand" for recreational purposes. Judge Edison held that plaintiffs have no property right to build on the "dry sand", thus, there could be no "taking" in the constitutional sense caused by the amendment to Goal 18 (prohibiting the construction of all residential, commerical and industrial structures on the "Oregon shore").

The trial court's dismissal of plaintiffs' complaint is erroneous for the following four reasons:

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833 F.2d 1270, 1274 (9th Cir. 1986)

(A) Thornton determined that the State could enjoin the construction of a fence built on the "dry sand", not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.

(B) To construe Thornton as preventing all economic development by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, et. seq.); a result no understood, let alone argued for, by anyone until this case.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of

ancient custom is not applicable to their land.

(D) If Thornton is construed to prevent all economic development of private property consisting of "dry sand", it constitutes an unconstitutional taking of plaintiffs' property.

The above points will be taken in order.

(A) Thornton determined that the State could enjoin the construction of a fence built on the "dry sand", not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.

A brief review of the facts surrounding Thornton is helpful in understanding its holding.

In 1966, Mr. and Mrs. Hay placed driftwood logs upright in front of their motel in Cannon Beach and strung a wire between them to allow their hotel guests use of the dry-sand area. Politicians and several editorialists raised a hue and cry, which prompted the 1967 legislature to adopt the Beach Bill. ORS 390.605, et seq. In the winter of 1967, storm waves washed out the Hays' driftwood pilings. In the spring of 1968, the Hays commenced reconstruction of a more permanent fence. The State sought an injunction, claiming a prescriptive public recreational easement and the power to proscribe development without a permit under the new Beach Bill. The trial judge found a prescriptive easement in the public, and granted the injunction. See McLennan, Public Patrimony: An Appraisal of

Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters, 4 Environmental L. Rev. 317, 356-359 (Spring, 1974)

On appeal, the parties briefed and argued the prescriptive easement and the Beach Bill's application. Thornton explicitly limited its holding to whether the State could **limit** the record owner's use and enjoyment of the "dry-sand" area:

> "The only issue in this case, as noted, is the power of the state to limit the record owner's use and enjoyment of the dry-sand area, by whatever the boundaries of the area may be described." (Id. at p. 587) (Italics supplied)

The Thornton court expressly recognized that the legislature in enacting the Beach Bill (ORS 390.605, et seq.) could not divest the record owner of his rights in his

private property, including the dry-sand area:

> "The state concedes that such legislation cannot divest a person of his rights in land, Hughes v. Washington, 389 US 290, 88 S. Ct. 438, 19 L.2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line. Borax Consolidated Ltd. v. Los Angeles, supra." (Id. at 591)

The provisions of the 1967 Beach Bill are enlightening. The Legislature's intent is clearly set forth as follows:

> "(1) The legislative assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the sea shore and ocean beaches of the state from the Columbia River on the north to the Oregon/California line on the south so that the public may have the free and uninterrupted use thereof.
>
> (2) The legislative assembly recognizes that over the years the public has made frequent and uninterrupted use of land abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes,

> further, that where such use has been sufficient to create easement in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.
>
> (3) Accordingly, the legislative assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon . . ."
> (Codified as ORS 390.610(1), (2) and (3) (1967)) (Emphasis added)

The Oregon legislature's intended control of development is also clearly set forth in the 1967 Act in Section 5 (codified ORS 390.640):

> "No person shall, except as provided in Section 6 of this Act, erect, make or place any appurtenance, structure or improvement on any property that is within the area along the Pacific Ocean located between the extreme low tide and the elevation of 16 feet following natural topographic contour lines."

Section 6 of the Act, as now codified at ORS 390.650, reads as follows:

> "(1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks & Recreation Department on a form and in a manner prescribed by the department stating the kind of and reason for the improvement.
>
> . . .
>
> (4) In acting on an application the State Parks & Recreation Department shall take into consideration the matters described by ORS 390.655.
>
> . . ."

ORS 390.655 provides:

"The State Parks & Recreation Department shall consider application and issue permits under ORS 390.650 in accordance with standards designed to promote the public health, safety and welfare and carry out the policy of ORS 390.610, 390.620-390.660, 390.690 and

390.705-390.770. The standards shall be based on the following considerations, among others:

> (1) The public need for healthful, safe, aesthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.
>
> (2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.
>
> (3) The land uses, including public recreational use, if any, the improvements in the area, and trends in land uses and improvements, the density of development and the property values in the area.
>
> (4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area."

The Beach Bill expressly contemplates development and, thereby contradicts any notion that development rights were expunged by Thornton in the absence of the court's express repeal of ORS 390.640 and 390.650.

Thus, Thornton, read in the light of its historical setting, addressed solely the question of whether the State could limit an owner's use of the dry-sand area. It sustained the lower court's injunction, but on an entirely new ground: the public's interest is based on ancient custom, rather than prescriptive use. The Thornton holding was limited to "the only issue in this case, . . . the power of the State to limit the record owner's use and enjoyment of the dry-sand area, by whatever the boundaries the area may be described." Thornton, Id., at p. 587, (emphasis added).

Thornton **did not** eradicate an owner's right to any and all development of the dry sand. Its holding allowed an injunction under the Beach Bill because Hays had no permit provided for by the Beach Bill. The

power of the State to invoke the statute was founded upon the "ancient custom" of public recreational use, a right which was neither briefed nor argued before the Thornton court.

(B) To construe Thornton as preventing all economic develop-ment by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, et. seq.); a result not understood, let alone argued for, by anyone, until this case.

Thornton did not repeal, directly, or by implication, ORS 390.650's grant of the right to build upon the "dry-sand" area, if the owner first obtained a permit from the State. The owners' right to development was subject to improvement permits, based upon stated criteria, including, inter alia:

"present and prospective need for conservation";

"development of the resources in the area";

"suitability of the area for particularly uses and improvements";

the "trend and land uses and improvements;

the "density of development and the property values in the area"; and,

the "need for recreational and other facilities and enterprises in the future development of the area".

ORS 370.655

The argument that no such development right has been recognized by the State is absurd in face of the statute, and in the face of the fact that the Department of

Parks & Recreation's predecessor, the State Highway Commission, has granted building permits for a hotel and a motel on the "dry-sand" portion of Oregon's beaches, i.e., Inn at Spanish Head and Driftwood Shores. [2]

Thornton properly analyzed, stands for the proposition that the State may regulate use of the dry-sand portion of Cannon Beach, and other land similarly situated. It did not rule that all development was prohibited, thereby repealing the Beach Bill's permissive development component. The legislature has never repealed the portion of the Beach Bill allowing controlled development in the 22 years since

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[2] Evidence of such permits would have been presented in a motion for summary judgment or at the time of trial, as was mentioned in the hearing on the motion to dismiss (See Tr. p. 22). The motion to dismiss, pursuant to ORCP 21A(8), did not afford plaintiffs such an opportunity.

Thornton. Certainly, the Department of Transportation, or its successor, Parks & Rec., would have sought repeal of the development component by now, if they thought Thornton had repealed, by implication, all building rights on the dry-sand area of Oregon's beaches. No such repeal effort has been found to ever have been attempted by the state in the eleven legislative sessions since Thornton.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of ancient custom is not applicable to their land.

Plaintiffs were, obviously, not parties to the Thornton case. Thus, their real property rights could not be effected by the decision. Priest v. Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751 (1914). United States v. Wood, 466 F.2d 1385 (9th

Cir. 1972). As noted by Delo in The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, 4 Environmental L. Rev. 383 (Spring 1974), the holding in Thornton should not have res judicata effect upon third parties owning dry sand who were not before the court.[3]

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[3] The obvious question is how the Oregon supreme court in the *Thornton* decision can agree with the plaintiffs that the Beach Bill alone cannot 'divest a person of his rights in land' but find that the Beach Bill and the English doctrine of custom together can do so? The answer with respect to Hay is that he had notice of the contested nature of his ownership rights and that the public's use of his beach area satisfied the requirement of English custom as described by the Oregon supreme court. The federal court stated that there was no sudden change in 'either the law or the policy of the State of Oregon. For at least 80 years the state as a matter of right claimed an

Since Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), it is clear that "the right to exclude [others is] 'one of the most

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> interest in the disputed land.' Hay, in effect, had his day in court. The remainder of the owners of private beachfront property with the exception of Fultz, however, have not had their day in court. While they can be held to have notice of the contested nature of title to the dry-sand beach area, it does not follow that public use of all the dry-sand area satisfies the requirements of the English doctrine of custom as described by the Oregon supreme court. To so hold, as the court did in *Thornton*, seems to take property in violation of the Fifth and Fourteenth Amendments. The arguments can be made that the holding violates proper procedure since the other property owners were not before the court to litigate their rights." *Id.* at p. 408.

To the same effect, *See:* 22 Stanford Law Review 564 (1970)

essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982), quoting Kaiser Aetna, supra. As pointed out above, supra p. 14, none of the parties to the Thornton case briefed or argued the application of custom to the land then in question; nor did Hay move for reconsideration.

This case is, therefore, the first case to question the legality of applying the ancient doctrine of custom to the land in question. Plaintiffs respectfully submit that the Thornton application of ancient custom to their land, contiguous to Hay's land, is legally and factually erroneous.

The Thornton court paraphrased the seven elements of ancient custom, as set forth in Blackstone's, Commentaries (1765-1769), as follows: (1) Antiquity; (2) An exercise of use without interruption; (3) Peaceable use; (4) Reasonable use; (5) Certainty as to the land in question; (6) Use as a matter of right; and (7) Consistency with other custom or law.

Of these elements, the first: antiquity; the second: an exercise of use without interruption; the fourth: reasonable use; the sixth: use as a matter of right; and the seventh: consistency with other custom or law, are each of doubtful applicability in this case, and were of doubtful application to the property before the Thornton court. They shall be analyzed in order:

1. Antiquity.

The Thornton court stated, in part:

> "Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long 'that the memory of man runneth not to the contrary.' Professor Cooley footnotes his edition of Blackstone with the comment that 'long and general' usage is sufficient. In any event, the record in the case at bar satisfies the requirement of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion." Id. at p. 595-596.

The Thornton court was well aware of the long legal history connected with Oregon's beaches, and its part in it. In 1892, the Oregon Supreme Court, in Bowlby v. Shively, 22 Or 410, 30 P. 154 (1892) ruled that the State held title to the tidelands between low and high tide line, and could sell it, and that an upland owner, taking by

federal patent, had no superior claim to such tidelands sufficient to cloud the title of a subsequent grantee of the State's interest in such tidelands. No mention of a recreational servitude to the tideland is made in the opinion. The decision was affirmed in Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S. Ct. 548 (1894).

In 1899, the Oregon legislature declared:

> "The shore of the Pacific Ocean, between ordinary high and extreme low tides, and from the Columbia River on the north to the south boundary line of Clatsop County on the south, is hereby declared a public highway, and shall forever remain open as such to the public." Laws of Oregon (1899, p. 3).

From this legislation, it is clear that the Oregon Legislature was aware that Oregon's title did not run above ordinary high tide, as it did not declare a public right to use

of land to the high water line or mark, but, limited the public highway's east boundary to "ordinary high tide". Nor did the legislature attempt to codify a right to public use of the dry-sand area based on prior long use. Thus, from 1899 to 1913, the only declaration by the State regarding public use to the "beach" involved the tidelands or "wet sands" area of the beach and then only from the Columbia River to the south boundary of Clatsop County.

In 1913, Governor Oswald West introduced a bill, which, upon passage, declared:

> "The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California state line on the south, <u>excepting such portion or portions of such shore as may have heretofore been disposed of by the state</u>, is hereby declared a public highway and shall forever remain open as such to the

public." (General Laws of Oregon, Chapter 47 1913) (Italics supplied)

This Act extended the public's right to use of the tidelands or "wet sands", under the guise of a public highway, from Clatsop County to the California border, except where the State had earlier transferred said land to a private ownership. The exception of the public's user rights to wet sands which had earlier been conveyed to private parties would indicate that no prescriptive easement or customary use was presumed to override private rights to the exclusive use of wet sands theretofore conveyed by the State. Even more clearly, no common usage by the public to the "dry-sand" area of the beach was thought to exist as late as 1913, so as to vest the public's recreational rights with supremacy over private ownership

of the dry sand.

In fact, the State has entered into 37 separate sales of land below ordinary high tide from 1874 through 1923 up and down the Oregon coast. See, Devers, M.J., The Shore of the Ocean, State Highway Commission (1949), cited in 1969 Beach Bill, 55th Legislative Assembly, prepared by: Office of the Majority Leader, House of Representatives, (App.-2).

In 1947, the legislature repealed the State Land Board's power to alienate its tidelands. By that time, the 250 miles of usable beach along Oregon's 355-mile coast line was held as follows:

"State of Oregon	61	miles
Federal Government	52	miles
Local Government	18.2	miles
Total Public Ownership	131.2	miles (53%)
Total Private		

Ownership	119.0 miles (47%)
Total Usable Beach Area	250.2 miles."

1967-69 Oregon State Legislature's Interim Committee on Highways, page 22, cited in 1969 Beach Bill, 55 Legislative Assembly (App.-16)

Historically, the State has consistently limited its recreational rights to tidelands or "wet sands" of the Oregon coast, and has sold 47% of the title to the tidelands of Oregon usable beaches. This certainly does not indicate that the legislature, or the State Highway Department, (predecessor to the Parks & Rec.) administered the Oregon beaches with any conception that there were prescriptive rights or rights based on ancient custom relating to Oregon's beaches; either the wet sand or dry-sand portions!

In fact, recreational use of the Oregon beaches, except for Seaside, Gearhart and Astoria, served by rail, awaited the coming of good roads in the 1930s. Taking into account the great depression and World War II, major recreational use of the Oregon shore may be said to have commenced in the late 1940s. See Oregon Blue Book 1985-86, History of Oregon, Terrence O'Donnell, pp. 443-444. (App.-31)

As recently as 1968, one year before Thornton was argued and decided, an initiative petition was submitted to the Oregon electorate proposing a constitutional amendment whereby the State declared its right to the "ocean shore", described as all land between extreme low tide and the line of natural vegetation (in absence of a line of natural vegetation, the line was set at

16 feet above sea level). The State was to give notice to all owners of the "ocean shore" of the State's declared rights to manage the "ocean shore" as a park. Such owners would have one year from receipt of such notice to file claims for recovery of their private rights to the ocean shore. Ballot Title, State Acquisition of Ocean Shore, 1968. (App.-33) The amendment was defeated "No: 464,140 to Yes: 315,175" upon a vote representing a very large turnout of 29% of the State's total population and 80% of the registered voters. Oregon Blue Book 1985-1986, pp. 399, 401 and 404. (App.-38)

Thus, when Thornton is read in its historical context, and with a knowledge of the extensive legislative record concerning Oregon's beaches, two things become apparent: First, the court, without the

benefit of briefs on the application of ancient custom ignored the state's long history of recognizingprivate property rights in the "wet sand" and "dry-sand" portions of Oregon's littoral land; and Second, the court, without historical referenced announced recreational use by the public, since land tenured systems were adopted and denominated that use a "right". Id. at 595-596.

In this case (as well as in Thornton), a tracing of the public's use of plaintiffs' dry sand may only go back to October 14, 1893, when the land was granted by the United States, through patent, to plaintiffs' (and Hay's) predecessor in title, John Boyson (App.-41). The issuance of the letters patent and recording thereof, bars all prior inchoate unrecorded claims,

except those prior rights noted in the patent.[4] Kerns v. Lee, 142 F. 985 (D.C. Or. 1906), Wilkinson v. Watts, 309 Ill. 607, 141 N.E. 383 (1923), Steel v. St. Louis S & R Co., 106 U.S. 447, 1 S.Ct. 389, 27 L.Ed. 226 (1882), Burlington K & S.W.R. Co. v. Johnson, 38 Kan 142, 16 P. 125 (1887).

As was held in Summa Corporation v. California ex rel State Land Commission and City of Los Angeles, 644 U.S. 198, 80 L.Ed.2d 237, 104 S.Ct. 1751 (1984), even if a state holds a servitude over land, that servitude is extinguished unless presented by the state in the federal patent proceeding, or it is extinguished upon issuance of the fee patent. See also,

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[4] The patent letter under which plaintiffs' claim only excepts water rights, ditches and reservoirs for use in manufacture and agriculture and mining claims. (App.- 77)

United States v. Title Insurance and Trust Co., 265 U.S. 742, 68 L.Ed.2d 1110, 440 S.Ct. 621 (1924); and Barker v. Harvey, 181 U.S. 481, 45 L.Ed. 963, 21 S.Ct. 690 (1901).

The first Ecola Inn was built in 1917 to serve a small logging camp. It was built on a promontory created by a retaining wall over a portion of the dry-sand area of the beach, extending approximately 100 feet west of the uplands (See Photo, App.-79). After an oiled-rock road came from Seaside to Cannon Beach in 1933, the Ecola Tavern was built behind a concrete seawall and car ramp to the beach. (See Photo, App.-80). In 1939, the then owner, E.A. Hollingshead, extended the original seawall north and the present Surfsand Resort Hotel was built. (See Photo, App.-81) Therefore, plaintiffs' predecessors in title have, since 1917,

encroached upon the dry-sand portion of their property without objection by the state or public.

Thus, the antiquity of a claim of public user in Thornton amounts to the period between 1893 and 1917, or 23 years. Since 1917, plaintiffs, and their predecessors in title, have excluded public use of the land enclosed by their retaining wall. This does not readily square with Blackstone's Commentaries concerning antiquity:

> "That it have been used so long, that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist."
>
> Blackstone's Commentaries on the Law of England, Vol. I, p. 76, University of Chicago Press (1979).

From the Commentaries, it would also appear that the adoption of the Beach Bill in 1967, would seem to end the custom of unconditional access, as the Beach Bill recognized the dry-sand owners' right to build upon the dry sand, subject to regulation. ORS 390.650-.655.

2. Exercise Without Interruption.

The Thornton court stated:

> ". . . a customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right . . ." Id. at p. 596.

At all times since 1917, the plaintiffs, or their predecessors in interest, exercised complete control of the dry-sand area which they had reclaimed for development to welcome the workers of a logging camp and subsequent overnight

tourists and daily restaurant customers. Thus, any use of the dry-sand area occurring after 1893 was interrupted in 1917 by the reclamation of the beach and expansion of that reclamation northward in 1939. Neither the state, nor any member of the public, objected or claimed any rights. In fact, as pointed out above, in 1968, the Oregon voters were presented with the question of litigating and/or paying for private rights to the dry-sand area.

The specific land before this Court lies immediately north of the retaining wall extended in 1939. That property was not enclosed in 1939. The State might argue that the public use of the property here in question, continued beyond 1939 to date. However, as pointed out in plaintiffs' Memorandum in Opposition to Defendant's Rule

21 Motions (Rec. 212), in 1970, the plaintiffs petitioned the State Highway Division to extend the retaining wall around the subject property, which petition was denied. They then, in 1982, petitioned Parks & Rec. to move the zone line westward to conform to the actual line of vegetation, which request was denied. They made the same zone line adjustment request in 1984 to the Department of Transportation, which request was denied.[5]

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[5] "In 1970, plaintiffs first submitted an application to the State Highway Division for a permit to construct a retaining wall to allow a commercial motel on their property. This request was denied. In 1979, as alleged in plaintiffs' [amended] complaint, plaintiffs entered into a joint venture agreement with the new owner of the adjacent hotel, the Surfsands Resort Hotel, to commercially develop their property. Since it was clear from the 1970 denial

that the state would not grant plaintiffs a permit to build a motel on their property, in 1982 plaintiffs instead submitted a request to the Parks & Recreation Division for a readjustment of the statutory zone line on their property. If the statutory zone line were adjusted to conform to the actual (permanent year-round) vegetation line on plaintiffs' property, plaintiffs would no longer need a permit from the state to build a motel on their property. Plaintiffs' request was denied. Plaintiffs appealed to LUBA, the Land Use Board of Appeals, but the appeal was dismissed on jurisdictional grounds. LUBA directed plaintiffs to appeal future zone line adjustment requests to the Transportation Commission.

In 1984, plaintiffs again submitted a request to the Parks & Recreation Division for a zone line adjustment to allow commercial development of their property. Their request was denied. This time plaintiffs appealed to the Transportation Commission. The Transportation Commission declined to recommend 'piece-meal' zone line adjustments to the legislature on

Therefore, the plaintiffs have, for 20 years, contested through petitions, the public's right to the use of the property in question, to no avail. However, they have attempted to interrupt the public's use by claiming their paramount right to the exclusive use of their property. It was

behalf of individual private property owners.

The Transportation Commission did, however, direct its staff to establish criteria for periodic review of the statutory beach zone line under the Administrative Procedures Act, so that private property owners would have an appropriate forum to challenge zone line adjustment denials. This has never been done. (Plaintiffs and other private property owners on the coast are left with no recourse to effect a change in the location of the zone line on their property, notwithstanding ORS 390.770)"
(Rec. pp. 212-211)

their only recourse, which failed in each instance.

4. Reasonableness of Public Use.

The Thornton court states this element of custom as follows:

> "The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community . . ." Id. at p. 596.

Sir William Blackstone's Commentaries seem to convey a different meaning of reasonableness of public use. Rather than connoting that peaceable enjoyment consistent with the land as satisfying this element, the Commentaries connote a concept of balancing the use of the land by the public against any good legal reason against

such use.[6] The "good legal reason" assigned against customary use of the dry sand is the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. Kaiser Aetna v. U.S., supra, at p. 17, Loretto v. Teleprompter Manhatten CATV Corp., supra, at p. 17; and Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 31, 97 L.Ed.2d 677 (1987). The

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6 "Custom must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it.
Blackstone's *Commentaries*, *supra*, p. 77

plaintiffs have exercised futile, but consistent efforts to enjoy their right to exclusive use of the dry-sand property in question, north of the 1939 extension of the retaining wall; which efforts have been rebuffed by the numerous bureaucracies appointed to administer the Beach Bill.

6. Public Use as a Matter of Right.

The Thornton court stated this element as follows:

> "The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes . . ." Id. at p. 597.

It cannot be denied that plaintiffs and the adjacent property owner have appropriated a portion of the dry sand of

Cannon Beach since 1917, and plaintiffs have endeavored to reclaim the property to the north for their exclusive use for over 20 years. Nor can it be argued that Driftwood Shores on the Oregon coast, and the Inn at Spanish Head have also developed dry sand, held in fee simple, for the exclusive use of private patrons. Indeed, the City of Seaside with its renowned vehicular turn around and one mile of esplanade has exercised domain over a very large portion of the dry-sand area of Seaside Beach. Thus, the custom on Cannon Beach, and land similarly situated, is not uniform and the public has not exercised recreational rights to these portions of the dry-sand areas of Oregon's beaches as a matter of right. The public has used the north portion of plaintiffs' property despite plaintiffs'

frustrated efforts to make some economic use of their property during the last 20 years as authorized by the Beach Bill.

7. Consistency With Other Custom.

The Thornton court stated the seventh element of custom as follows:

> "Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law." Id. at p. 597.

It is again submitted that the custom adopted in Thornton is inconsistent with the development component of the Beach Bill if it denies all development of the dry-sand area of the beach. It is also repugnant to the property rights of plaintiffs to exclude the public, so that they may make some economic use of the property, consistent with reasonable regulation provided for in

the Beach Bill. Nollan v. California Coastal Commission, supra.

In conclusion, prior to Thornton, neither Oregon's courts, its legislature, its administrative bodies, nor the public, have dealt with the dry-sand portions of Oregon's beaches as being subject to an ancient custom of recreational servitude. On the contrary, the plaintiffs, and their predecessors in title, have developed a portion of the dry-sand area they own, along with their neighbor to the north, for their exclusive commercial use, and since 1967, following adoption of the Beach Bill, have sought to make use of the remainder of their property to the north through all legal means available to them, without success. Thornton's holding is entirely inconsistent with the Beach Bill and plaintiffs'

constitutionally protected property rights.

(D) <u>If Thornton is construed to prevent all economic development of private property consisting of "dry sand", it constitutes an unconstitutional taking of plaintiffs' property</u>.

The position taken by the State, as echoed by the City and amici, and adopted by the trial court: that <u>Thornton</u> eradicates an owner's right to build anything on the dry-sand area of Cannon Beach, violates Article I, Section 18 of the Oregon Constitution[7] and the Fifth Amendment to the

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[7] Oregon Constitution, Article I, Section 18:

> "Private property should not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the State, without such compensation first assessed and tendered . . ."

U.S. Constitution, made applicable to this action by the Fourteenth Amendment.[8] A court's denial of a constitutionally protected right by declaring the right does not exist, is no more valid than a legislative or administrative taking. <u>Ruckelshaus v. Monsanto</u>, 467 U.S. 986, 1001, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 814 (1984), <u>Webbs Fabulous Pharmacies v. Beckwith</u>, 449 U.S. 155, 100 S.Ct. 1062, 90 L.Ed.2d 358

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[8] U.S. Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty of property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Fourteenth Amendment, Section 1:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law;"

(1980), Hughes v. Washington, 389 U.S. 290, 296-297, 88 S.Ct. 438, 442-443, 19 L.Ed. 2530 (1967). Smith v. Dept. of Human Resources, 301 Or. 209, 721 P.2d 445 (1986), cert. granted, 480 U.S. 916, vacated, 485 U.S. 660, on remand, 307 Or. 68, 763 P.2d 146 (1988), cert. granted, 489 U.S. 1077 (1989).

A case wrongly decided or outmoded by later events and subsequent decisions should be overruled. Heino v. Harper, 306 Or. 347, 759 P.2d 253 (1989); G.L. v. Kaiser Foundation Hospitals, Inc., 306 Or. 54, 757 P.2d 1347 (1988). See also, Judge Unis' dissent in Hammond v. Central Lane Communications Center, 312 Or. 17, ____ P.2d ____ (1991). This case fits criteria (1) and (2) enunciated in G.L. v. Kaiser

Foundation Hospitals, Inc., supra.[9]

As shown, below, the application of ancient customary public use to the land in question before the court in Thornton was inadequately considered. Further, ORS

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[9] "Ordinarily this court reconsiders a non-statutory rule or doctrine only upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided; (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or (3) that the earlier rule was grounded in an tailore to specific factual conditions, and that some essential factual assumptions of the rule have changed. Without some such premise, the court has grounds to reverse a well-established rule besides judicial fashion or personal policy preference, which are not sufficient grounds for such a change.
G.L. v. Kaiser Foundation Hospitals, Inc., 306 Or. at p. 59.

105.655[10], et. seq., was adopted in 1971, two years after Thornton, to limit Thornton's application to the "ocean shore"

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[10] ORS 105.677

> **"Permissive recreational use of land does not create easement; preservation of preexisting public rights.** (1) An owner of land who either directly or indirectly invites or permits any person to use the land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of the land for any recreational purpose without the consent of the owner.
>
> (2) The fact that an owner of land allows the public to recreationally use the land without posting or fencing or otherwise restricting use of the land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public the right to continued use of said land.
>
> (3) Nothing in this section shall be construed to diminish or divert any public right acquired by dedication, prescription, grant, custom or otherwise existing before October 5, 1973.

described in ORS 390.605-770. By so limiting Thornton, the legislature clearly expressed its public policy that ancient custom could not be used to take other private property in Oregon. Finally, upon the decisions in Kaiser Aetna v. United States, supra, Loretto v. Teleprompter Manhatten CATV Corp., supra, and Nollan v. California Coastal Commission, supra, the Thornton holding, as now interpreted by the lower court herein, cannot stand as good law.

The State's bold assertion that Thornton precludes any development on the dry sand is inconsistent with comments of the Oregon Supreme Court, made in another context. In Suess Builders v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982), a property owner sought approval for

residential development of land, so zoned, but was denied a right to develop the land. Thereafter, the City's comprehensive plan was amended designating two-thirds of the land for a future public park. The designation remained for seven years, making the land unavailable for development or sale at its fair market value. The landowner sued in inverse condemnation for the temporary taking, which deprived it of a fair return on its investment. The defendant city moved to dismiss the complaint on grounds that it failed to state a cause of action, which motion was granted. In reversing the dismissal, Justice Linde, speaking for the full court, noted that:

> "Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land.[5]" Id. at p. 259.

However, in footnote 5 following that statement, the court noted, in part:

> " . . . As we understand it, 'investment-backed expectations' are a necessary but not a sufficient element before a regulation precluding any economic use of property can be attacked as a compensable taking or as a deprivation of property under the 14th amendment; but private property actually taken for public use must be paid for whether it represents an investment or not. Of course there are hypothetical and not so hypothetical situations in which it may be argued that government is misusing regulatory power to impose on private property the burdens of actual governmental or public uses as a means of circumventing its obligation to pay, as for instance by . . . imposing a right of passage for the public across private land. See, e.g. Kaiser Aetna v. United States [citation omitted]; . . ."
> Id. at p. 259, ft. 5.

"[I]mposing a right of passage for the public across private land" is exactly what the State argues Thornton accomplished. An accomplishment which the Oregon Supreme

Court in Suess, at footnote 5, determined would require compensation.

That aside, the broad reading of Thornton contended for by the State cannot be sustained in the face of Nollan v. California Coastal Commission, supra. In Nollan, plaintiff owned a beachfront house in California whose property line ran to the mean high tide line. See: Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 8 L.Ed 9 (1935). The Nollans' request to build a larger house on their property was conditioned by the California Coastal Commission upon the Nollans' grant to the state of an easement across their beachfront property (dry sand) parallel to the foreshore. The Supreme Court succinctly put to rest the notion that a state agency could impose public access to

private property without compensation. The Supreme Court stated:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt that there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice BRENNAN contends) 'a mere restriction on its use,' post, at 3154, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interest, so long as it pays for them. [citation omitted] Perhaps because the point is so obvious we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other government action leads to the same conclusion. We have repeatedly held that as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of the rights that are commonly characterized

as property."' (Id., 483 U.S. at p. 831, 107 S.Ct. at 3145, 97 L.Ed.2d at p. 685-686)

Where government action results in a permanent, physical occupation of the property by the government itself or by others the Supreme Court has uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Loretto v. Teleprompter Manhattan CATV Corp., supra, and Kaiser Aetna v. United States, supra. The Nollan court also held that a "permanent, physical occupation" has occurred for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular

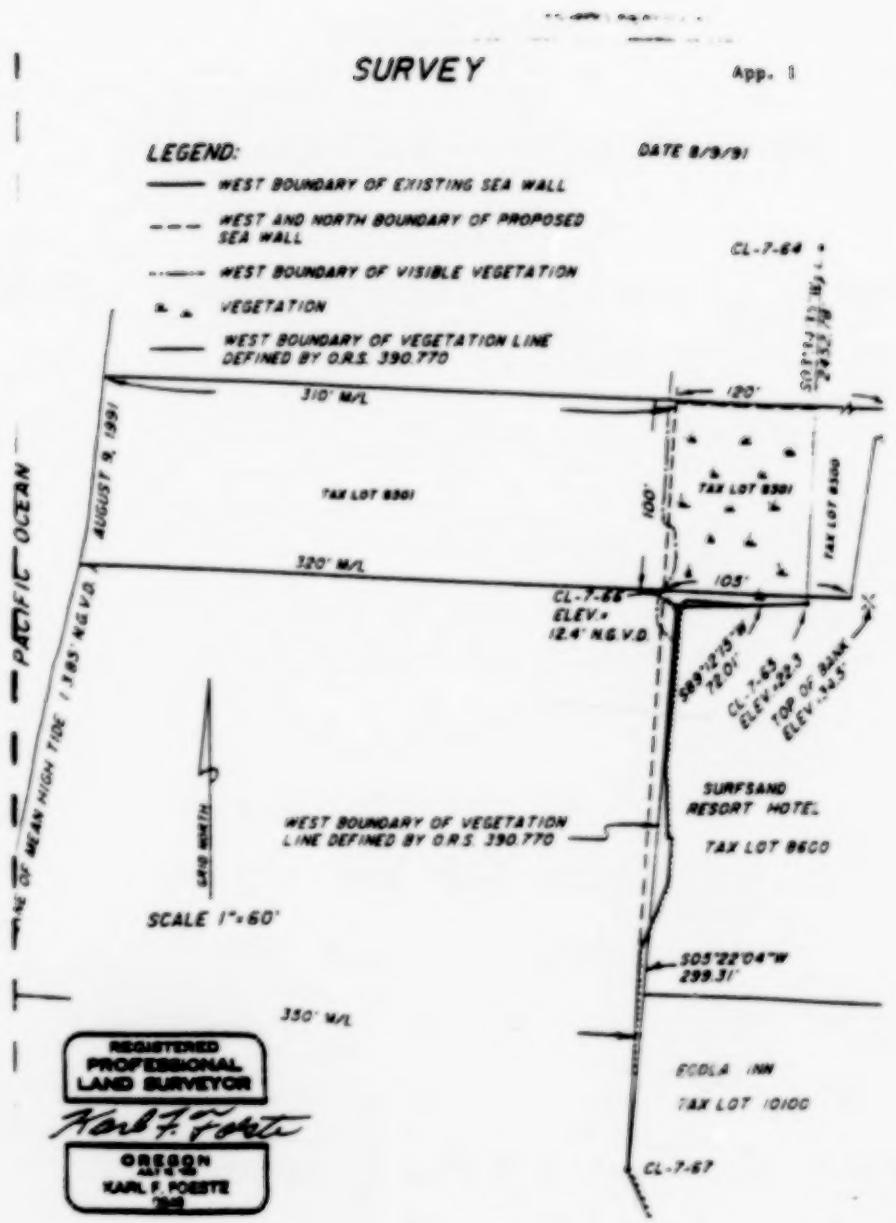
individual is permitted to station himself permanently upon the premises. Nollan, supra, 483 U.S. at 831-832, 107 S.Ct. at 3145, 97 L.Ed.2d at 685-686.

The jurisprudence of "taking without just compensation" has enormously expanded since Thornton. The vast majority of courts visiting the question of total prohibition of development of private property under the broad banner of police power have held that such outright prohibition constitutes a taking. See, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Browning-Ferris Indus. v. City of Maryland Heights, 747 F.S. 1340 (E.D. Mo. 1990) (zoning ordinance putting land fill out of existence constituted a taking); Lockary v. Kayfetz, 908 F.2d 543 (9th Cir.

1990) (water district's moratorium on water hook-ups presented factual questions of Fifth Amendment taking) rehearing den., 917 F.2d 1150 (9th Cir. 1990) Althous v. United States, 7 Ct.Cl. 688 (D.C. 1985) (ordinance requiring owner to maintain property in an undeveloped state constituted a taking), Annicelli v. Town of South Kingston, 463 A.2d 133 (R.I. 1983) (High Flood Danger District Ordinance which prohibited erection of single-family dwelling on barrier beach to protect beaches and dunes from erosion and to protect health, safety and welfare of public was a "taking"; Seidner v. Islip, 439 N.E. 352 (N.Y. 1982) ("Dune District" ordinance which limited improvements on plaintiff's property to pedestrian dune crossings and fences constituted a "taking"); Bartlett v. Zoning Commission,

282 A.2d 907 (Conn. 1971) (ordinance which restricted use of tidal wetlands to wooden walkways, wharfs, duck blinds, public boat landings and public ditches effects a taking); Maine v. Johnson et ux, 265 A.2d 711 (Me. 1970) (Wetlands Act prohibiting fill of tidelands rendering private property economically useless is a "taking"); Florida Rock Industries v. United States, 8 Ct.Cl. 160 (1985), mod., 791 F.2d 893 (1986), cert. denied, 479 U.S. 1053 (1987), on remand, 21 Ct.Cl. 161 (1990) (denial of dredge and fill permit for mining wetlands effects a "taking" where plaintiff was denied viable economic use of property); De St. Aubin v. Flacke, 496 N.E.2d 879 (1986) (denial of permit to fill tidal wetlands for residential development did not effect a "taking" where wetland restrictions

permitted cluster development and plaintiff failed to show that request for rezoning to cluster use would be denied by town). Dooley v. Town Planning Commission, 197 A.2d 770 (Conn. 1964) (zone change to flood plan restricting land development of parks, playgrounds, parking, etc. was confiscatory taking). See also, Drakes Bay Land Co. v. United States, 424 F.2d 574, (Ct.Cl. 1970) (National Park regulation of private property within park boundaries which effectively barred such land from development, constitutes a "taking"). Et seq.



BALLOT TITLE

STATE ACQUISITION OF OCEAN SHORE

PURPOSE: Constitutional amendment. Defines "Ocean shore" as shore between extreme low tide and vegetation line. Dedicates "ocean shore" as perpetual public park. Prohibits sales by state, political subdivisions. Allows leasing, easements and licenses in "ocean shore" if consistent with public use and enjoyment. Directs state identify and maintain public rights to "ocean shore." Requires state give written notice to claimants who may contest state's interest within one year thereafter. Confirms existing public rights in "ocean shore."

Be It Enacted by the People of the State of Oregon:

The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article XV and to read:

Section 10. (1) Ownership of the ocean shore, except any portions that may have been disposed of or not acquired by this state before the effective date of this section, is vested in the State of Oregon. Such ocean shore and all portions thereof acquired by the State of Oregon after the effective date of this section or the ownership of which is vested on or after the effective date of this section in a political subdivision within this state, shall be held forever as a park and recreational and scenic place, and shall not be alienated; however, leases, easements and licenses may be granted

with respect thereto in a manner prescribed by state law for purposes consistent with the public use and enjoyment thereof.

(2) The state agency charged by law with administering parks and recreational and scenic places shall take appropriate action in a manner consistent with law to identify and maintain public rights heretofore or hereafter acquired by dedication, prescription, grant or otherwise to any portion of the ocean shore that may not be owned by the State of Oregon or a political subdivision within this state.

(3) (a) As to all persons claiming any right, estate, lien or interest in the ocean shore, it shall be conclusively presumed that from and after the date on which notice is served as provided in this subsection the State of Oregon is in actual, hostile, visible, notorious, exclusive and physical possession of the ocean shore. This presumption shall not apply to persons who were or hereafter shall be in actual

physical possession of some portion of the ocean shore.

(b) Every action, suit or proceeding for the recovery of any right, estate, lien or interest in the ocean shore or to recover possession thereof shall be commenced within one year after the date the notice is served as provided in this subsection. For all purposes this subsection shall be construed as a statute of prescription as well as a statute of limitations.

(c) The state agency charged by law with administering parks and recreational and scenic places shall search the deed records of all counties in which ocean shore is located and shall give notice to any person, except the United States Government or an agency or department thereof, who appears from such records to claim any right, estate, lien or interest in the ocean shore. Notice given as provided in this subsection constitutes notice to all persons

claiming, through unrecorded instruments, any rights, estate, lien or interest in the ocean shore. The notice shall be served personally or by registered or certified mail to the last known address of the person to be served and shall include a copy of this subsection.

(d) It shall be considered the people's intent, in adopting this subsection, that if this subsection or any part thereof is held invalid under the Constitution of the United States, the remainder of this section shall continue in force.

(4) Nothing in this section divests the State of Oregon or a political subdivision within this state of its ownership of, or interest in, any real property, or limits any public rights heretofore or hereafter acquired by dedication, prescription, grant or otherwise.

(5) As used in this section, "ocean shore" means the shore of the Pacific Ocean between the line of extreme low tide and the line of natural

vegetation, from the Columbia River to the southern boundary of the State of Oregon; except that if the line of natural vegetation along any area of the ocean shore cannot be determined, the general trend of the line of 16-feet elevation above sea level, as determined in a manner consistent with law, shall constitute the boundary of the ocean shore along that area instead of the line of natural vegetation. However, at the mouth of a stream, estuary, river or creek, the ocean shore is considered to be between the line of extreme low tide and a straight line beginning at a point nearest the ocean on the line of natural vegetation or the line of 16-feet elevation above sea level, as the case may be, on one side, and extending across the mouth to a similar point on the opposite side. All elevations above sea level are referred to the United States Coast and Geodetic Survey Sea-Level Datum of 1929, as adjusted from time to time. The state agency charged by law

with administering parks and recreational and scenic places shall determine the line of extreme low tide and the line of natural vegetation in a manner consistent with law.

IN THE SUPREME COURT
OF THE STATE OF OREGON

IRVING C. and JEANETTE STEVENS, Petitioners on Review,	)	TRIAL COURT No. 90-2061
v.	)	APPELLATE COURT No. A68916
CITY OF CANNON BEACH, and STATE OF OREGON, DEPARTMENT OF PARKS & RECREATION, Respondents on Review.	)	

PETITION FOR REVIEW OF IRVING C. and JEANETTE STEVENS

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Clatsop County, Honorable Thomas E. Edison, Judge.

Court of Appeals Opinion Filed: August 5, 1992;

Honorable John H. Buttler.

I. PRAYER FOR REVIEW.

Irving C. and Jeanette Stevens, Appellants below and Petitioners on Review pray that the Supreme Court of the State of Oregon grant review of the Court of Appeals decision in the above-captioned case (Stevens et al. v. City of Cannon Beach, et al., 114 Or. App. 457, ___ P.2d ____ (1992) and reverse the decision which affirms the trial court's dismissal of Appellants-Petitioners' claims of inverse condemnation against Respondents.

II. REASONS FOR REVERSAL.

A. NATURE OF THE DECISION:

The Court of Appeals held that the trial court correctly interpreted State ex rel Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) as having eradicated all development rights on the dry sand portion

of Cannon Beach by private owners and, therefore, the Stevens could not assert an inverse condemnation claim for denial of their right to build a retaining wall because they simply had no development rights whatsoever since 1969, the year of the Thornton decision.

The Court of Appeals stated:

> "The question before this court, therefore, is necessarily very narrow. We must follow the Supreme Court's decision unless, as plaintiffs argue, that decision constitutes a taking in itself and is contrary to the United States Supreme Court decisions applying the Takings Clause of the Fifth Amendment." (Opinion p. 2, emphasis in original)

The Court of Appeals then noted that Lucus v. South Carolina Coastal Council, ___ U.S. ___, ___ S.Ct. ___, 120 L.Ed.2 798 (1992) held that regulations or decrees that deprive land of all economically beneficial use may be sustained only if the statute or

court decree creating such proscription adhered to the owner's title to begin with, when the owner purchased the property.

The Court of Appeals, in footnote 2 of its Opinion, noted that while Stevens acquired the property in question in 1957 (some 12 years before Thornton), they were still bound by Thornton's holding that the public had a right to exclusive occupation of the dry sand beach based upon the English common law doctrine of ancient customs, because the Thornton holding was inexplicably merely an enunciation of the law which existed "long before 1957." (Opinion p. 3, fn 2)

The Court of Appeals, finding itself bound by Thornton, as interpreted by the lower court, sustained the trial court's dismissal of the Stevens "takings" claims.

B. SPECIFIC ERRORS REQUIRING REVERSAL

1. The Court of Appeals erroneously limited its analysis of Thornton by merely accepting the State's expansionist reading of Thornton as eradicating all improvement rights by owners of the dry sand, a position never before adopted by any court in Oregon prior to the trial court's ruling, which interpretation directly conflicts with the recent Supreme Court case of Lucus v. South Carolina Coastal Council, supra. See: State ex rel Thornton v. Hay, 254 Or 584, 462 P2d 671 (1969) and Lucus v. South Carolina Coastal Council, ___ U.S. ___, ___ S.Ct. ___, 120 L.Ed.2d 798 (1992).

2. The Court of Appeals illogically begs the question of Thornton's retroactive application to pre-Thornton dry

sand property owners by its conclusory statement in footnote 2 that:

> "Plaintiffs argue that their interest, acquired in 1957, predated the decision in State ex rel Thornton v. Hay, supra, and is therefore senior to the public rights recognized in that case. However, the date of the decision is not relevant. Rather, the question is when, under the reasoning of Hay, the public rights came into being, and the answer is that that must [have] occurred long before 1957." (Opinion p. 4, fn 2.)

See Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); Marriage of Vinson, 57 Or App 355, 644 P.2d 635, rev. den. 293 Or. 456, 650 P.2d 928 (1982) and The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, (4 Env. L.Rev. 383, Spring 1974).

3. The Court of Appeals erred in implying that Lucus, supra, defers to State property and nuisance law, when retroactively applied.

See Lucus v. South Carolina Coastal Council, supra.

4. The Court of Appeals misconstrued its role as not encompassing the power to limit Thornton so as to be consistent with the State's own policies of beach development and so as not to impliedly repeal ORS 390.650 (the development component of the Beach Bill).

See: ORS 390.650-655.

5. The Court of Appeals erred in failing to decide the propriety of the trial court's dismissal of the taking claims on a Rule 21(A)8 motion, upon which no evidence can be adduced to support the facial and as applied taking claims. See: ORCP 21A(8).

6. The Court of Appeals erred in failing to decide the Stevens request that

it decide pending motions not decided by the trial court so as to avoid further appeals if reversal and remand is ordered by this honorable court.

7. The Court of Appeals erred in refusing to allow the Stevens to file a brief in response to the amici curiae brief.

III. ARGUMENTS IN SUPPORT OF REASONS TO REVIEW AND REVERSE.

The arguments for review and reversal are set forth below under headings used in Section II B above.

1. THE COURT OF APPEALS ERRONEOUSLY LIMITED ITS ANALYSIS OF THORNTON BY MERELY ACCEPTING THE STATE'S EXPANDED INTERPRETATION OF THORNTON AS ERADICATING ALL IMPROVEMENT RIGHTS BY OWNERS OF THE DRY SAND, A POSITION NEVER BEFORE ADOPTED BY ANY

COURT IN OREGON PRIOR TO THE TRIAL COURT'S RULING, WHICH INTERPRETATION DIRECTLY CONFLICTS WITH THE RECENT U.S. SUPREME COURT CASE OF LUCUS v. SOUTH CAROLINA COASTAL COUNCIL, supra.

The Court of Appeals obviously felt it had no power to examine the scope of Thornton, and therefore limited its analysis of it to reciting the oft-quoted conclusory words of Justice Goodwin that the Thornton decision: ". . . takes from no man anything which he has had a legitimate reason to regard as exclusively his." (254 Or. at 599) The Court of Appeals thus felt bound to state, "Plaintiff's have never had the property interests that they claim were taken by defendants' decisions and regulations." (Opinion p. 2.)

The decision of the Court of Appeals cannot be sustained in the face of Lucus,

supra. In Lucus, the U.S. Supreme Court explicitly ruled:

> " . . . We have . . . described at least two discreet categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the proper owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. [Citing: Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)] (120 L.Ed.2d at 812)
>
> "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. [Citing: Agins v. City of Tiberon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Keystone Bituminous Coal Assn. v. DeBenedictus, 480 U.S. 470, 107 S.Ct. 1234, 94 L.Ed.2d 472 (1987) and Hodel v. Virginia Surface Mining and Reclamation Assn., Inc. 452, U.S 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)] (120 L.Ed.2d at 813)

The U.S. Supreme Court further held in Lucus that in the case of land:

> ". . . [W]e think the notion pressed by the council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." (120 L.Ed.2d at 820)
>
> "Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 426. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the

> courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." (120 L.Ed.2d at 821)

In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the U.S. Supreme Court ruled that the right to exclusive occupation of one's land is "one of the most essential sticks in the bundle or rights that are commonly characterized as property." 483 U.S. at p. 831, 107 S.Ct. at p. ___, 97 L.Ed.2d at pp. 685-586 (1987). The Nollan court further held a "permanent physical occupation" has occurred for purposes of a taking analysis, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to

station himself permanently upon the premises. 483 U.S. at p. 831-832, 107 S.Ct. at p. 3145, 97 L.Ed.2d at p. 686. Thus, under Lucus, supra, and Nollan, supra, Thornton, as now interpreted by the Court of Appeals, constitutes both a "permanent physical occupation" takings as well as a confiscatory regulation takings. Such takings can be accomplished by court decree as well as by statute or regulation. See Lucus, 120 L.Ed.2d 831.

No one has, or could, argue that when the Stevens purchased the property in question for additional motel units in conjunction with their neighbor, that the state or affected property owners could enjoin such construction based on doctrines of property or nuisance law. In fact, in 1967, in adoption of the Oregon Beach Bill, ORS 390.605, et seq., the Oregon legislature

explicitly contemplated development and improvements on the dry sand of Oregon beaches subject to reasonable regulations by the State through the Department of Transportation. See ORS 390.650-655. Thus, the Thornton court, by sua sponte decree some 12 years after the Stevens purchased their land, proscribed all economically beneficial use of the dry sand portion of the property. A practice explicitly prohibited by the Lucus decision.

This Court can avoid the collision of Thornton with Lucus by holding Thornton to its facts, i.e., the State has power to reasonably limit construction on the dry sand pursuant to the Oregon Beach Bill, but not to deprive an owner of all economic use of the land.

In fact, no Oregon court in the 23 years since Thornton has ever interpreted

Thornton as imposing a total prohibition of dry sand private economic development, until the Court of Appeals below did so. That holding required the Court of Appeals to distinguish Lucus. The plaintiff respectfully submits that the Court of Appeals did not distinguish Lucus. This Court should now address the issue.

2. THE COURT OF APPEALS BEGS THE QUESTION OF THORNTON'S RETROACTIVE APPLICATION TO PRE-THORNTON DRY SAND PROPERTY OWNERS BY ITS CONCLUSORY STATEMENT IN FOOTNOTE 2 THAT:

> "PLAINTIFFS ARGUE THAT THEIR INTEREST, ACQUIRED IN 1957, PREDATED THE DECISION IN STATE EX REL THORNTON V. HAY, SUPRA, AND IS THEREFORE SENIOR TO THE PUBLIC RIGHTS RECOGNIZED IN THAT CASE. HOWEVER, THE DATE OF THE DECISION IS NOT RELEVANT. RATHER, THE QUESTION IS WHEN, UNDER THE REASONING OF HAY, THE PUBLIC RIGHTS CAME INTO BEING, AND THE ANSWER IS THAT THAT MUST [HAVE] OCCURRED LONG BEFORE 1957." (Opinion p. 4, fn 2)

The Court of Appeals erred in assuming Thornton's now expanded meaning retroactively applies to all privately owned dry sand of Oregon's beaches regardless of private owners' rights acquired with the title purchased before Thornton. As noted by Delo in The English Doctrine of Customs in Oregon Property Law: State ex rel Thornton v. Hay, (4 Env. L. Rev. 383, Spring 1974) and in 22 Stanford Law L. Rev. 564 (1970), the Thornton decision, applied to other property owners of dry sand retroactively, presents serious problems of violation of the takings clause and the due process clause of the Fifth Amendment of the United States Constitution. (Plaintiff's brief pp. 17-18, fn 3)

Retroactive application of Thornton should not occur, as to do so violates the criteria of when a court-made rule should

not have retroactive effect. In Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court succinctly stated the criteria to be used in limiting a decision to prospective application only:

> "First, the decision to be applied retroactively must establish a new principal of law either by overruling clear past precedent on which litigants may have relied. [Citing: Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 at 496] Or by deciding an issue of first impression whose resolution was not clearly foreshadowed [Citing: Alan v. State Board of Elections, 393 U.S at 572] Second, it has been stressed that 'we must & weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [Citing: Linkletter v. Walker, 381 U.S. at 629] Finally, we have weighed the inequity imposed by retroactive application for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by holding of nonretroactivity.' Cipriano v. City of

> Houma, 395 U.S. at 706" (404 U.S. at 403-404) (Emphasis added)

Clearly, Thornton established a new principal of law by deciding "an issue of first impression whose resolution was not clearly foreshadowed." Admittedly, under the second criteria, the application of retroactive effect would further the state's interest in obtaining the "essential stick" of exclusive use of dry sand by private owners without compensation. However, such retroactive effect does direct violence to the essential property right of exclusive use and does further violence to the due process clause of the Fifth Amendment to the U.S. Constitution with the inequitable result of a taking of property without compensation, under the third criteria.

The criteria for considering retroactivity is well-established in Oregon.

See Marriage of Vinson, 57 Or. App 355, 644 P2d 635, rev. den. 293 Or. 456, 650 P2d 928 (1982) (nonretroactivity applied to McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed.2d 589 (1981); Moen v. Peterson 312 Or. 503, 824 P2d 404 (1991) (applied retroactive holding of Hartzog v. Keeney, 304 Or. 57, 742 P2d 600 (1987) as it applied an earlier rule announced in Krummacher v. Gierloff, 290 Or. 867, 627 P2d 458 (1981)). See also American Trucking Association v. Smith, 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990); McKesson v. Div. of Alcohol of Florida, 496 U.S. 18, 110 S.Ct. 2323, 110 L.Ed.2d 17 (1990).

Of great importance is the Court of Appeals cursory treatment of Thornton's retroactive application which totally ignores the Supreme Court's specific holding in Lucus, supra, which requires compensation

for a retroactive application of a new rule depriving land owners of all economic benefit from their land:

> "Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logical antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think with our "takings" juris- prudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property. . . . In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> "Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved; [Citing: Loretto v. Teleprompter Manhattan CATV

Corp.] - though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare Stranton v. Wheeler, 179 U.S. 141, 163 (1900) (interests of 'riparian owner in the submerged lands . . . bordering on a public navigable water' held subject to Government's navigational servitude), with Kaiser Aetna v. United States, 444 U.S. at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must adhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place[d] upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise." [Footnotes omitted] (120 L.Ed2d at 830-821) (Emphasis added)

In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987), the right to exclusive occupation of one's land is "one of the most essential sticks in the bundles of rights that are commonly characterized as property." Citing: Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979) and Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

Clearly, neither the State, nor any other property owner, could have enjoined the construction of the retaining wall sought by the Stevens based upon public or private nuisance, as its development was completely within the zoning and building ordinances of the City of Cannon Beach, but for the absolute prohibition of Goal 18, adopted in 1985, twenty-eight years after

the Stevens purchase of the parcel in question. The enunciation of the new rule of ancient custom as the foundation for the public's recreational rights to the dry sand beaches came by "decree" 12 years after the Stevens purchased the subject property with a view toward development in cooperation with their adjacent property owner. Therefore, if Thornton is given retroactive effect, it amounts to a taking of private property without compensation under the Lucus holding. If Thornton is not given retroactive effect to property owners owning the dry sand portion of the beach prior to Thornton it does not constitute a taking.

This honorable Court has not been required to consider the Chevron criteria of limiting Thornton solely to prospective application. It must do so now in light of Lucus, supra. In so doing, this Court

should be guided by the reasoning in American Trucking Association v. Smith, supra, and McKesson v. Div. of Alcohol of Florida, supra. In those cases the Supreme Court determined that where a new rule of law is established which overturns an unconstitutional law or unconstitutional application thereof, the due process clause of the Fourteenth Amendment requires fullest relief from the unconstitutional exactions or proscriptions unless the case establishing the new law is limited to prospective application, as was the ruling in American Trucking Assn., supra. Clearly, a prospective application of Thornton, as broadly read as the Court of Appeals reads it, avoids the obvious unconstitutional taking of dry sand property of pre-Thornton owners and also avoids the lack of due process argument available to such owners.

This honorable Court should now decide this issue.

3. THE COURT OF APPEALS ERRED IN IMPLYING THAT Lucus DEFERS TO STATE PROPERTY OR NUISANCE LAW RETROACTIVELY APPLIED.

The Court of Appeals stated, "The [Lucus] opinion makes it clear that that issue [the proscribed use burdened owner's title to begin with] is to be decided under the 'State's law of property and nuisance.'" (Opinion, p. 3) Lucus made clear that a "'state by ipse dixit, may not transform private property into public property without compensation, . . .' Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)." (120 L.Ed.2d at 823) Instead, as it would be required to do if it sought to restrain Lucus in a common law

action for public nuisance:

> ". . . South Carolina must identify background principals of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the state fairly claims that in proscribing all such beneficial uses, the Beach Front Management Act is taking nothing." (120 L.Ed.2d at 823)

No one has claimed that, prior to Thornton, persons owning dry sand thought they could not develop portions thereof to the exclusion of the public except Justice Goodwin in his unsupported statement:

> ". . . [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry- sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede." (254 Or. at 588)

In fact, as the Stevens brief points out (App Br. pp 17-31), the legal history

concerning the beaches is that the State has only claimed title to the foreshore or "wet sand area" (the land between high tide and low tide) since 1899 when the Legislature declared the wet sands of Clatsop County were a public highway. That wet sand "highway" was extended to the remainder of Oregon's beaches in 1913 except where the State had earlier transferred said land to private ownership. (General Laws of Oregon, Ch. 47, 1913) By 1947, the State had sold 119 of the 250 useable miles of the wet sand to private owners or 47 percent of the wet sands of Oregon. Thus, the State did not perceive some inchoate recreational servitude, or how could it sell 47 percent of the wet sand to private ownership.

In addition, Justice Goodwin, in 1969 inexplicably forgot that in 1968 an initiative petition was voted on by

Oregonians to amend the constitution of this State to establish a procedure whereby upland owners claiming dry sand ownership could make claim to their dry sand by suit or action within one year of the initiative petitions becoming a part of the Oregon Constitution. The petition was defeated 464,140 "no" to 315,175 "yes". Thus, 315,175 Oregonians feared that dry sand owners had the right to exclude the public unless barred by a one year claim period for that right to be purchased by the State through bond revenues. Further, since 1917, the predecessors in title of the Stevens and their neighbors to the north have encroached upon the dry sands of Cannon Beach without complaint by any person, public or private.

When it is remembered that the Thornton court adopted the doctrine of ancient custom sua sponte without the benefit of any

briefing on the applicability of ancient custom to the land in question, it is understandable that the court's factual premises were faulty. Stevens respectfully submit that their estate in the dry sand included the later proscribed interest of some economic development when they purchased the property in 1957 for purposes of development in conjunction with the adjacent motel. Thornton cannot decree, ipse dixit, the abolition of the fundamental right to exclude the public in 1969 without requiring compensation for prior owners of property affected, such as the Stevens. See Lucus, 120 L.Ed2d 821-822; and see Nollan v. California Coastal Commission, 483 U.S. at 831, 107 S.Ct. at 3145-3146, 97 L.Ed.2d at 685 (1987).

4. THE COURT OF APPEALS MISCONSTRUED ITS ROLE AS NOT ENCOMPASSING THE POWER TO LIMIT THORNTON SO AS TO BE CONSISTENT WITH THE STATE'S OWN POLICIES OF BEACH DEVELOPMENT AND SO AS NOT TO IMPLIEDLY REPEAL ORS 390.650 (THE DEVELOPMENT COMPONENT OF THE BEACH BILL.)

All courts are empowered to interpret a prior decision so that the prior decision remains consistent with other statutory and common laws of the state. See: Salem College & Academy, Inc. v. Employment Division, 298 Or. 471, 695 P.2d 25 (1985). The Court of Appeals adopted the trial court's interpretation that Thornton abolished all right to economic use of the dry sand that would exclude the public from a portion thereof, as pressed by the State herein. It did so without considering the

three legally incongruent effects that the expansionists reading of Thornton causes.

The first incongruence is the Court of Appeals' expanded reading of Thornton is contrary to the recent holding in Lucus, supra. See Argument at III 1 above.

The second inconsistency is that in 1967 the Oregon Legislature adopted what is now ORS 390.650-655 (the portion of the Beach Bill that provides for improvements of the dry sand by owners thereof).[1] Clearly,

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[1] Whereas ORS 390.650:

> "(1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks and Recreation Department on a form and in a manner prescribed by the Department stating the kind of and reason for the improvement.

The standards for considering a requested improvement by a dry sand owner are:

> "(1) The public need for healthful, safe,

if Thornton precludes all development, as Goal 18 does[2], then the Beach Bill's

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> esthetics surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.
>
> "(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.
>
> "(3) The land uses, including public recreational use, if any, the improvements in the area, and trends in land uses and improvements, the density of development and the property values in the area.
>
> "(4) The need for recreational and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area." (ORS 390.655.)

[2] LCDC Goal 18 - Beaches and Dunes.

"Implementation Requirements

development component has been repealed by implication. No implied repealer of the Beach Bill's development component has been acknowledged by the Parks and Recreation Department in the 23 years since Thornton, and the Department is still administering improvement applications and granting them! The Attorney General's expansionist reading of Thornton as precluding all improvement of the dry sand is at odds with the Beach Bill statute and its present day administration by the Parks and Recreation Department. The State cannot have it both ways, which is the

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. . .

(2) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active fore-dunes, and on other fore-dunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding. . . ." R-5

anomalous effect of reading Thornton as extinguishing all economic use of the dry sand by its private owners, yet the State's granting such development powers to private owners on the dry sand.

The third inconsistency is that the Kyllos Restaurant is presently being built on the dry sand, albeit east of the statutory zone line, in Lincoln City. If Thornton precludes exclusive private development on the dry sand, it applies to the dry sand "lying between the line of mean high tide and the visible line of vegetation." (Thornton, supra, at 586.) Thus, the Kyllos Restaurant is proscribed by Thornton, as the Court of Appeals now interprets it, yet the State is utterly moribund in preventing the development of this private restaurant on the dry sand, which restaurant will exclude nonpatrons.

This issue was raised in oral argument before the Court of Appeals, yet the Court's Opinion does not mention the incongruence of Thornton's abolition of private exclusive development when just such a development is currently taking place several miles south of the Stevens' property. This Court has the task of squaring the Court of Appeals decision with an inconsistent statute and state policy or the present case presents another thorny constitutional issue, i.e., one of equal protection of the law provided by the Fourteenth Amendment to the U.S. Constitution.

5. THE COURT OF APPEALS ERRED IN FAILING TO DECIDE THE PROPRIETY OF THE TRIAL COURT'S DISMISSAL OF THE TAKING CLAIMS ON A RULE 21(A)(8) MOTION, UPON WHICH NO EVIDENCE COULD BE ADDUCED TO SUPPORT THE FACIAL AND "AS APPLIED" TAKING CLAIMS.

The Supreme Court has often observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by an ordinance or statute depends largely upon the particular circumstances in each case. United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). A Rule 21(A)(8) Motion precludes submission of evidence and historical documents in support of a claim. The Complaint and Amended Complaint adequately alleged a facial taking claim as well as "an applied" taking claim against Respondents, as the Complaint alleged a total prohibition of development under LCDC Goal 18 and the City's ADBO zoning. Since Nollan, supra, a permanent physical occupation occurs for the purpose of proving an unconstitutional taking where

individuals are given a permanent and continuous right to pass to and fro so that the real property may continuously be transversed, even though no particular individual is permitted to station himself permanently upon the premises. (Nollan, supra, U.S at 831-832, 107 S.Ct at 3145, 97 L.Ed. at 685-686.) Such a physical occupation is a per se taking which requires compensation irrespective of the social benefit achieved by that taking and the minimal nature of the intrusion. Loretto v. Teleprompter Manhattan CATV Corp, supra. If this case was to be dismissed, it should have been dismissed on a summary judgment motion so that the material set forth in plaintiff's brief to the Court of Appeals could be utilized and additional evidence could have been offered in the form of Affidavits.

Et seq.

BEFORE THE SUPREME COURT

FOR THE STATE OF OREGON

IRVING and JEANETTE STEVENS, Petitioners, vs. CITY OF CANNON BEACH and STATE OF OREGON, DEPARTMENT OF PARKS & RECREATION, Respondents.	)	Case No. S39585 **ORAL ARGUMENT**

TRANSCRIPT ON APPEAL

BE IT REMEMBERED That the above-entitled matter came on regularly for hearing before Supreme Court, Salem, Oregon, on March 3, 1993, and the following represents a transcript of the electronically recorded proceedings of said matter.

APPEARANCES OF COUNSEL

GARRY McMURRY
Attorney at Law appearing for the Petitioner

MICHAEL REYNOLDS

THE COURT: Today, the first case, we have some lawyers -- I realize it's only two blocks away from where they otherwise would have gone -- but I do appreciate the lawyers. Garry McMurry is appearing on behalf of the petitioner in the first case, and he's a Portland lawyer, and he's had a long-time practice in Portland, and appearing for the state and the Department of -- state of Oregon, Department of Parks and Recreation, Respondents, Mike Reynolds, who has been a senior member of the Attorney's General Office for a member of years.

Thank you both for your willingness to come over here, and with that introduction, Mr. McMurry.

MR. McMURRY: May it please the Court and learned Counsel. Garry McMurry, appearing for petitioners on review, Irving and Jeanette Stevens.

There are three fundamental reasons why the Court of Appeals' decision must be reversed. First, the Attorney General has consistently argued in this case that Thornton precludes all development on the dry sand portion of Oregon beaches. But the Attorney General's client, the Parks and Recreation Department and its predecessor, the Department of Transportation, allowed development on the dry sand portions of the Oregon beaches in at least three instances: one, Driftwood Shores in Florence; two, the Inn at Spanish Head, just south of Lincoln City,

and most recently, in 1992, the building of the Kyllos Restaurant, adjacent to the Dee River in Lincoln City.

We've taken the overflights, 1978 overflights, which are done by the Department of Transportation in the mapping and topography of the Oregon beaches. We show you here an overflight that was blown up and a registered engineer has interposed the zone line as it actually is, (indiscernible) Beach Bill zone line.

You can see from this photograph that the western face of the hotel at the Inn at Spanish Head is west of the zone line on the dry sand as is the entirety of the southwest vantage of the hotel, all the decking and all the pools. So that is

the fact on the ground that can be determined by, not only this photograph, but the actual view of the hotel itself.

THE COURT: Mr. McMurry, why isn't the response -- why isn't the response to that argument simply because an agency of the state has not done its job in protecting the public's interest is no reason to permit your client to violate the public interest recognized in Thornton?

MR. McMURRY: There are two reasons why that would not be the sound position, Your Honor. The first is that this shows that the agency interprets Thornton as not barring all development. We must not assume that an agency willfully violates the law. It merely shows that the agency

vested with the control of development takes a different view than the lawyers who represent them.

The second reason is --

THE COURT: Before you go to that, I'd like to test that reason by an additional question, Mr. McMurry, if I could. Leaving aside the administrative interpretation in these three given cases in whatever it is, 300 miles of beach, I'm curious about whether these -- especially the Inn at Spanish Head -- does that interfere with any access of the public to the dry sand beach? Does this picture interfere with any access of the public to the wet sand by going over the dry sand?

MR. McMURRY: Yes. Obviously -- obviously you can't traverse the cliff

side Inn at Spanish Head --

THE COURT: (Indiscernible).

MR. McMURRY: -- (indiscernible) to get to wet sand. So the effect that there has been an enclosure of that space, then there has been an intrusion into the unfettered flow of pedestrians on the dry sand.

THE COURT: I thought it would have been a little hard to get down to the beach at the inn, so that's why I asked the question.

MR. McMURRY: I think that's correct.

THE COURT: Let me work with that just a minute longer to be sure. Would you tell me the facts of your client's position. Does your client intend to

allow the public to cross over without fetter?

MR. McMURRY: No.

THE COURT: Thank you.

MR. McMURRY: Correct.

THE COURT: Excuse me, Mr. McMurry, does timing play any relevant --

MR. McMURRY: I'm sorry?

THE COURT: The timing. For instance, if the Inn at Spanish Head was started in, I guess, in 1968, and the Beach Bill was passed in 1969 --

MR. McMURRY: '67.

THE COURT: -- '67, does that have any relevance as to the timing, or would you say the interpretation (indiscernible) or was the Inn at Spanish Head following the Beach Bill?

MR. McMURRY: It was following the Beach Bill, yes.

THE COURT: Are you going to get back to his question? And then I have a question, a procedural question.

MR. McMURRY: Yes, I wanted to give the second answer to that. This is no grounds -- because the agency has goofed, this is no grounds to continue that.

I suggest to you that Thornton cannot be read, as a matter of law, or as a matter of fact, as the AG has enunciated. And I'll get into that a little bit in greater detail.

THE COURT: Mr. McMurry?

MR. McMURRY: Yes.

THE COURT: This case comes to us on an appeal of the trial court granting a

motion to dismiss, is that right?

MR. McMURRY: Yes, 21(A)(8).

THE COURT: Is this document that you're showing us in the record?

MR. McMURRY: No, it is not, Your Honor, and could not have been.

THE COURT: Also, all these comments about Spanish Head and all these other places. We don't know anything about that, do we?

MR. McMURRY: No, but I'm --

THE COURT: Is it proper to argue about what this department has done elsewhere when we're simply considering whether your complaint states facts sufficient to constitute a claim?

MR. McMURRY: Yes, Your Honor, under Rule of Evidence 201(A)(2)(f) any

fact that is readily ascertainable from the public record -- these are all documents taken from the Department of Transportation and it's a fact in existence that's readily ascertainable -- and the precise --

THE COURT: You're telling me that in ruling on a motion to dismiss you can consider facts other than those that are contained on the face of the complaint?

MR. McMURRY: I say that physical facts, this Court can take judicial notice of them.

THE COURT: Mr. --

MR. McMURRY: In the argument.

THE COURT: Actually what you're referring to is not Rule 201. It's the judicial notice of legislative facts.

That is to help us determine what the law is or ought to be. 201 gives adjudicated facts. This is not an adjudicated fact.

MR. McMURRY: All right, it would be 202, then.

THE COURT: No, not 202. Just judicial notice of legislative facts. There's no rule on it. What you're doing is trying to give us facts like a Brandies Brief (indiscernible).

MR. McMURRY: Right. Correct.

THE COURT: Well, that may be what its purpose is, Mr. McMurry, but I, for one, am not the least bit interested in having you tell me where lines are drawn on the sand. I want to know whether your complaint states cause of action. That's what this case is about and as far as I'm

concerned that's all this Court ought to answer.

MR. McMURRY: Very well, Your Honor.

THE COURT: I'm the only -- maybe the only one that feels that way, so you do as you please -- but I'm just going to warn you that as far as I'm concerned you're taking time away from what matters.

MR. McMURRY: All right, I don't want to take any more time. I just want to show you what in fact existed --

THE COURT: I don't want to accept your representations as to in fact exists, Mr. McMurry. As far as I'm concerned it's a matter for proof, and this is not a case involving evidence.

MR. McMURRY: I was hoping that the others would.

THE COURT: All right.

MR. McMURRY: Let me go to the second ground why the interpretation of the Attorney General as to the meaning of Thornton is improper. To accept the argument requires the repeal, implied repeal, of the Oregon Beach Bill development component, ORS 390.655. Now, I think that the Attorney General, in order to avoid that implied repeal, has changed its argument.

If you'll look at page 6 -- I'm sorry, footnote 6 at page 10 of the Attorney General's Response to Petition for Review, you'll find that the Attorney General now says, ellipses, quote, "...the

Beach Bill arguably gives back to dry sand property owners some ability to place development on the dry sand, provided they mitigate the interference such development would cause to the public access rights on the dry sand."

I think that footnote puts the -- puts the Attorney General in a position identical to the petitioner's, that Thornton is not an absolute bar to development on the dry sand and thereby avoid the implied repealer of ORS 390.655.

With that aside, the second reason why Thornton cannot be interpreted as the Attorney General and now the Court of Appeal has stated as a total ban to development on the dry sand is that it collides directly with Lucas v. South

Carolina Coastal Council. You'll remember that the Stevens bought this property in 1957, 12 years before Thornton. Under Lucas a per --

THE COURT: But the theory of Thornton is that the first title from the common ownership of the public represented by the federal government, the first title from that common ownership, flowed out from the federal government impaired or holding back in the common ownership in the ability to cross the sand to get to the ocean. Now, that bill may be even wrong, because I didn't read Thornton before I came this morning, but that would be right back before, maybe in the 1800's, maybe 1855 when some federal land act was passed that encouraged homesteading or

sale at $5 an acre or something --

MR. McMURRY: 1850, and the patent was issued in 1893. So that is correct. But clearly --

THE COURT: So I'm saying -- you're saying they bought it, and the question is what did they buy if the public always owned it?

MR. McMURRY: Right, right. Because the doctrine of custom or prescription cannot run against the federal government. And I'll get to that because what the Court in Lucas said was a per se taking, i.e., a physical invasion or regulation that deprives the owner of all viable economic use is a per se taking and must be compensated unless -- unless the regulation or decree is founded upon

principles that are well-understood that inform property and nuisance law of the state.

Now, obviously, the Attorney General argues that Thornton was merely enunciating a well understood rule that had existed in the Oregon law since territorial days, and that is their argument. That position is wrong for a number of reasons. The fact is that in the territorial government of Oregon no settler could obtain title to the land. There was no land tenured system under the Oregon Territory. In fact, in 1848, Congress passed a law that said all laws heretofore passed in said territory making grants of land or encumbrances to lands are declared void. That's set forth in

Shivley v. Bowlby, 152 at page 50.

THE COURT: To be sure I understand what you're telling me that the territorial government and the territorial legislature couldn't grant the land --

MR. McMURRY: Right.

THE COURT: -- but I was talking about the federal land grant legislation that tracked the Northwest ordinance and bills.

MR. McMURRY: Right, that was passed in 1850, and that set up the first -- the first surveying of the Oregon Territory by sections, quarter sections, et cetera, and set up the patent procedure by which homesteaders could claim lands. The patent in the property in question was issued in 1893. Now, obviously, upon

statehood in 1859, the Oregon -- Oregon adopted a constitution. But in the admission act itself, the federal admission act of 1859, Congress stated the following: quote, "The people of Oregon shall provide by an ordinance, irrevocable without consent of the United states, that said state shall never interfere with the primary disposal of the soil to bona fide purchasers thereof."

Now, there's a case law that goes back a century that says no cloud on the title exists on federal land that is patented to a bona fide purchaser unless claim is made by the state or any third party. Clean, clear title, unencumbered title, passes by act.

Obviously in this case the state of Oregon made no claim as to any sort of recreational servitude of any kind, and there is no reference in the patent on any patent that affects the Oregon beaches. Consequently, as a result of that as a matter of law, if custom did exist, it only came into play in 1893 as a matter of law.

THE COURT: The ability to acquire, prescriptive through customs, is that what you're saying?

MR. McMURRY: Prescription or custom, right.

THE COURT: Okay.

MR. McMURRY: Stevens' predecessor built the first retaining wall in 1917, 24 years after the property had been

obtained.

THE COURT: Mr. McMurry, I hate to be overtechnical. Is this in your pleadings?

MR. McMURRY: The date of building?

THE COURT: No, is your pleading about -- retains the historical facts regarding the --

MR. McMURRY: I don't know that it's in the complaint. I don't think we put in a date that it was first built. But it's in the briefs from --

THE COURT: Well, I'm -- I certainly want you to try your case, but I am bothered by the rule. It seems to me that we're going to be limited by what the pleadings say.

MR. McMURRY: All right.

THE COURT: That's at least what I'm supposed to try this case upon.

MR. McMURRY: All right. Thornton was the very first decision in Oregon recognizing that custom could transfer property interest and rights. It was not a well-settled principle, and Justice Goodwin so advised and so stated. This is a new enunciation. And we think, and we think in the briefs between pages 19 and 31, we established that had there been briefing and a thorough understanding, five of the seven elements of custom are lacking as a matter of fact, as a matter of social and political and legal history.

The third reason -- the third reason why this --

THE COURT: Mr. McMurry, I think it's obvious that this is true, but I just want to be sure that -- you're asking us to overrule the decision that was made in 1969 about public access to the beaches, the Supreme Court decision?

MR. McMURRY: No, I'm asking you to limit it to its holding that the state has the power to regulate the use of the dry sand area but not the power to destroy any economic utilization of the land.

THE COURT: That's why I asked you if your client intended to fetter the passage of the public over the dry sand to get to the ocean, and you said yes.

MR. McMURRY: Yes.

THE COURT: Okay.

MR. McMURRY: Yes, there's going to be a retaining wall built and a motel built on the 106 feet by 65-foot piece of property in question in this case.

THE COURT: You say regulate, and I'm saying if they're in the way, that -- you know --

MR. McMURRY: But there's no --

THE COURT: You do understand why I'm asking the question?

MR. McMURRY: Yes, of course I do.

THE COURT: Okay.

MR. McMURRY: But there's no economic use that could be made of the land if you can't -- if you can't affect the right of the public to walk to and from upon it. The third reason why --

THE COURT: You only want to affect it?

MR. McMURRY: I'm sorry?

THE COURT: Your complaint only asks to affect it, or does it ask to exclude?

MR. McMURRY: It asks to exclude.

THE COURT: Okay.

MR. McMURRY: To do the same as Kyllos Restaurant.

MR. McMURRY: The third reason that the Court of Appeals decision cannot stand is because Lucas states absolutely emphatically that a "state by ipse dixit may not transform private property into public property without compensation. Instead, as it would be required to do if it sought to restrain Lucas in a common

law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibits the uses he now intends in the circumstances in which the property is presently found."

The Court also stated, "A law or decree with such an effect as a per se taking must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners or other uniquely affected persons under the state's law of private nuisance or by the state under its complementary power to abate nuisances that affect the public generally or otherwise."

THE COURT: Before you go on with that, would you tell me what the complaint said your grounds for relief is? You stated them.

MR. McMURRY: Yes, there were two defendants and there were two claims for relief: one, an applied taking as it related to the land in question, and, two, that Goal 18 established a facial taking as a matter of law.

THE COURT: Forgetting that Goal 18 for a minute, the implied taking would have occurred when? When the legislature passed the Beach Bill in 1967?

MR. McMURRY: No, the taking occurred when the various divisions that had review of this, Parks and Recs, the Division of State Lands, and the City of

Cannon Beach all denied the permit based in part upon Goal 18, the absolute denial or prohibition of any development upon the beaches or dunes of Oregon. Any.

THE COURT: Again, that -- some of that relates back to Goal 18.

MR. McMURRY: Right.

THE COURT: I'm sure that, having thought about the case, you know what you've intended for it. Shouldn't your client or the predecessor -- they've owned it since '57, you say?

MR. McMURRY: 1957.

THE COURT: Shouldn't they have done something to deny the public's taking when it occurred by the passage of the Beach Bill? Have they let the statute run?

MR. McMURRY: No. No, because the Beach Bill does not -- does not preclude building. The Beach Bill explicitly allows development of the property. ORS 390.655.

THE COURT: As long as people can pass over it?

MR. McMURRY: No. No. It explicitly allows -- it's a --

THE COURT: So your answer is it didn't really take?

MR. McMURRY: That's right?

THE COURT: Mr. McMurry, a factual question: In your complaint you allege that most of your -- most of the plaintiff's land falls within the active dune and beach overlay zone established by the Cannon Beach ordinance. Does your

complaint -- anyplace in your complaint do you tell us where that piece of land falls insofar as the Beach Bill, as the land described in the Beach Bill is concerned?

MR. McMURRY: Yes, Your Honor, there are two separate tax lots. One, Tax Lot 8500 is east of the zone line and the other is west of the zone line. In other words, the visible line of vegetation separates the two tax lots. And we describe it.

THE COURT: Okay, and the visible line of vegetation is the dividing line as far as the Beach Bill's concerned?

MR. McMURRY: That's right.

THE COURT: So a person can tell by looking at the complaint then that a portion of your land, then, is within --

is within the Beach Bill area and a portion is not.

MR. McMURRY: Right.

THE COURT: How are we going to decide -- well, then -- I really am thinking aloud here -- but the Beach Bill has no effect, then, upon the use of your land that's outside the Beach Bill area.

MR. McMURRY: That's correct. We didn't file the case on the basis of the Beach Bill violated our rights. We depend upon the Beach Bill for our rights. It's Goal 18.

THE COURT: And the city ordinance.

MR. McMURRY: That's right. That's right.

THE COURT: But don't you come within Lucas to be talking about a land

use planning, there still is the fact of the public assertion to the right. You're saying that was not a complete assertion, and I understand, but I guess I want to say there's still a fact of the public's assertion to the right?

MR. McMURRY: The difficulty with it is that the Attorney General argues that the retroactive application of Thornton does not do harm to the holding, explicit holding in Lucas. We respectfully disagree. We think that Lucas -- that Thornton cannot be applied retrospectively or retroactively to property that was held prior to that decision and was bought for the purpose of economic development. And we think that to so hold --

THE COURT: Excuse me, you don't mean that second thought. It was property that's held for economic development; it doesn't matter what it was held for.

MR. McMURRY: That's correct.

THE COURT: Leave that out.

MR. McMURRY: That's correct. And this case specifically satisfies the jurisprudence of retroactivity, when it's to be applied and when it's not. Thornton decided an issue of first impression, number one. Secondly, the retrospective application of this rule will retard its effect because we think that it will be struck down as a taking and a taking without due process of law because it should not be applied to property owners who held the property prior to the

decision in Thornton.

THE COURT: Let me stop you for a second, Mr. McMurry. If that's true, why wasn't McDonald v. Halvorson decided on that basis? I mean, that would have been the first door out, and it would have taken two pages to decide the case.

MR. McMURRY: No, because the Court -- we argued to the Court that the Beach Bill did not apply in any way, and Thornton didn't apply because it wasn't beach. And that was the factual quick way to get that case disposed of.

THE COURT: Well, I'm glad you think it was quick.

MR. McMURRY: I'm sorry I said that. I really am. My time is up.

THE COURT: Thank you, Mr. McMurry. Mr. Reynolds.

MR. REYNOLDS: May it please the Court. I'd like at the beginning to, perhaps, clarify where we are and simplify, hopefully, the arguments that we have on why we believe that the plaintiffs' argument that they've presented to this Court have no merit.

At bottom this is a very straightforward and uncomplicated case. The plaintiffs' compliant at the Court of Appeals expanded the meaning of the Court's decision in Thornton v. Hay when the Court concluded that plaintiffs could not place any structures on their dry sand lot. Yet Thornton clearly says that the owner of a dry sand lot may not construct

obstacles that interfere with the public's right of access, the public's easement, recreational easement over the dry sand area.

Plaintiffs complain that if Thornton means what the Court of Appeals has said then Thornton's in fact a taking of their property which is requiring compensation. Yet recent Supreme Court decisions make it clear that when a state merely applies its existing property law to a particular factual situation that no taking results.

I'd like to address both of those arguments in more detail and respond to a couple of the points that Mr. McMurry has raised here. Before I do --

THE COURT: Mr. Reynolds, let me stop you. You've left out one piece of Mr. McMurry's argument as I understand it, and that additional piece is that Oregon law -- Oregon property law, whatever other states' property law might be
-- Oregon property law cannot permissibly have included a public easement, whether derived from prescription or from custom, over the property in question because, to do so, would be to say that there was a cloud on the title from the time the patent for that land was issued in the 1890's and such a cloud on title was not permissible under the Oregon Admission Act. That is to say that the state's granting of title of any property is given to the state under the admission act had

to be free and clear unless such cloud upon the title was disclosed at the time.

So I want to be complete about it. I think that was a piece of his argument.

MR. REYNOLDS: Well, that's a piece of his argument that he makes here today for the first time. That's not contained in any of the briefs that you can see before you. But I would like to address that, and if I forget, when I'm done --

THE COURT: I'll remind you.

MR. REYNOLDS: -- please remind me to come back to it, thank you.

MR. REYNOLDS: There's some discussion here about Thornton and the Beach Bill, and I want to get to that perhaps right at the beginning and hopefully if the Court has any questions

about the interrelationship we can get those resolved right now.

Thornton establishes sort of a baseline of the public's rights of access to the dry sand area. That is a right which the legislature in the Beach Bill has said is vested in the state of Oregon. But the Beach Bill is not the only regulatory provision that the state has adopted in response to the principles in Thornton. We also have the statewide planning goals, and Goal 18 in particular; that is a goal that was adopted by the Land Conservation and Development Commission through authority delegated to it by the legislature.

So there are really two pieces of regulation that the Court has to keep in

mind when we're considering this. One is Goal 18 which bans all residential developments and commercial and industrial buildings on active foredunes; the second is the Beach Bill which, with respect to other portions of the dry sand area, does permit some development.

Now, it's our position, and I don't think there's any question about it, that the rights that the public have vested in them as a result of Thornton v. Hay is a right which the legislature may control on behalf of the public, and certainly the legislature can give back a little bit of what Thornton has said is the right that adheres in the public. So there simply isn't a conflict here.

THE COURT: Would you tell me again, what is the right the public has under Thornton?

MR. REYNOLDS: The right the public has under Thornton, Your Honor, is the right of -- this Court has characterized it as a recreational easement, public right of access for recreational purposes on the dry sand area with which private property owners may not interfere.

THE COURT: And is the words "dry sand area," are those words of art?

MR. REYNOLDS: Those are words that refer, Your Honor, to the area between the mean high tide and the vegetation line. In essence, above the wet sand --

THE COURT: The permanent vegetation.

MR. REYNOLDS: Above the wet sand to the permanent line of vegetation.

THE COURT: And does the complaint in this case tell us what land -- where the land that's involved in this case lies with respect to the dry sand area as you've just defined it?

MR. REYNOLDS: What it does, Your Honor, there is an attachment to the complaint as an exhibit, that does have a map of the property. I think it has the statutory vegetation line drawn on that. I'm not sure what the exhibit number --

THE COURT: The so-called meander line?

MR. REYNOLDS: Well, this is the statutorily drawn -- the statutorily drawn line of permanent vegetation. And it

shows that --

THE COURT: You're talking about the metes and bounds descriptions in the --

MR. REYNOLDS: I believe so.

THE COURT: Okay.

MR. REYNOLDS: And it shows that at least the front lot, the seaward lot of the two lots the plaintiffs own, I think are pretty much entirely seaward of that vegetation line. But I don't believe it does answer the Goal 18 question of whether this is an active foredune.

Again, to back up for just a moment. The plaintiffs alleged in their complaint that Goal 18 -- as a result of Goal 18, the beaches and dunes goal as well as the City's comprehensive plan, but

primarily the beaches and dunes goal, this denial of development -- or that goal on its face and as applied to their property prevented them from being able to develop their property. I don't believe there, other than their allegation that the goal applies to their property, I don't believe there's any factual information in the record that actually shows this is an active foredune. But I think for purposes of the motion to dismiss, it was assumed that their property is subject to Goal 18.

THE COURT: That's an appropriate assumption, isn't it? That is to say if their allegations would permit the offer of evidence to demonstrate that there's a foredune area in it, then that's sufficient to get past the motion to

dismiss, is it not?

MR. REYNOLDS: That would be our position.

Are there any other questions about -- I think -- I mean, that kind of answers one of their questions, I think, which is that Thornton -- that the state is taking an inconsistent position here with respect to Thornton v. Hay and the Beach Bill in the sense that we are taking the position that Thornton effects a total ban on development. We think Thornton does establish the right of the public to be free of any kind of development that interferes with their right of access. The fact that the state has perhaps given something back under the Beach Bill while at the same time maintaining fairly severe

regulations with respect to development on the active foredune under Goal 18 is not an inconsistency. It's a power that the state has as a guardian of the public's easement.

THE COURT: Could you tell me what type of improvement could be constructed on property such as this without interfering with one's right -- the public's right of access?

MR. REYNOLDS: That is -- Justice Peterson, that's pretty much a factual question. I guess that we're --

THE COURT: Give me an example of one thing that could be built or constructed or placed on this without interfering with the public's right of access?

MR. REYNOLDS: Well, I'm not sure -- I'm not sure as a factual matter that there is anything. We took the position below in the trial court that there was no facial taking under Goal 18 because Goal 18 does permit some development. All Goal 18 does prohibit outright are residential developments, commercial and industrial buildings. I'm not a building expert, and we haven't had any factual information to develop what else is left, but the goal does refer to other developments being permitted, provided certain conditions are met.

So I'm assuming the answer is there are some developments that could still be allowed on the active foredune. But they can't be commercial and industrial

buildings or residential developments.

THE COURT: Would Goal 18 permit the erection of a wall or a support for a building that was further inland providing that the wall or support did not materially interfere with the public's access to the beach?

MR. REYNOLDS: I believe Goal 18 has provisions providing for sea walls under certain circumstances as does the Beach Bill.

THE COURT: So if there was evidence from a hydrologist or an engineering geologist that said it was necessary in order to secure buildings that were behind the active dune line, Goal 18 would not outright forbid such erection?

MR. REYNOLDS: So long as the development -- may I qualify -- so long as the development is already there.

THE COURT: Right.

MR. REYNOLDS: Now, if the sea wall were necessary to permit a --

THE COURT: A new --

MR. REYNOLDS: -- backfilling and a new development, I'm -- it might depend on whether that development were on an active foredune or a portion of it or whether it was on the upland.

In 1969 this Court dusted off and applied a principle of property law that was rooted in the common law that secured for present and future generations recreational access rights to the dry sand area of Oregon beaches. In Thornton v.

Hay this Court applied the common law doctrine of custom, and it held that the public, through it's long and continuous usage of the dry sand area on the Oregon beaches, had acquired the right to recreate on that dry sand. This was a right of which private property owners could not interfere.

This Court in the State Highway Commission v. Fultz decision has referred to that right as a recreational easement. And I think that's a fair characterization of the term inasmuch as it involves an interest in land that's held by the public, and it certainly is an interest which burdens the servient estate of the dry sand owners.

The Court of Appeals in this case applied the Thornton decision. The Court assumed that statewide planning Goal 18 denied the plaintiffs the ability to develop their dry sand lots in Cannon Beach and that without development the lots could not be put to any economically beneficial use. So the assumption of no economically beneficial use as a result of the ban on development I think was made clearly by the Court of Appeals.

But the Court then held that denying plaintiffs the ability to develop their lots did not constitute a taking entitling the plaintiffs to compensation. To amount to a taking, Goal 18 would have to deprive the plaintiffs of a property interest.

The interest at issue here that we're talking about are development rights. In light of the public's recreational easement, plaintiffs' property rights simply do not include development rights, at least development rights that would interfere with the public's right to access the dry sand area. Without property interest that include development rights, a regulation that prohibited development could not amount to a taking.

Now, plaintiffs in their briefs, at least, made essentially two arguments in response to the Court's decision. First they argued the Court of Appeals had expanded the meaning of Thornton to say that property owners have no right to

develop their dry sand property if it interferes with the public's access right to the dry sand area.

Plaintiffs contend that Thornton should not be construed to prohibit all development to allow some economically beneficial use to their property even though some economically beneficial use would interfere with the public's access rights to dry sand.

Secondly, they argue that the Court of Appeals interpretation of Thornton constitutes a taking under the United States Supreme Court's most recent decision in Lucas vs. South Carolina Coastal Commission. Plaintiffs argue that under that decision Thornton effects both a development ban which results in a

deprivation of any economically beneficial use as well as a physical invasion of their property. Both of those effects are results which Lucas, they contend, says constitute a taking.

We think our answers to their arguments are fairly straightforward. First the Court of Appeals, we submit, properly interpreted and applied the Thornton decision. I mentioned this before but I feel I need to reiterate it. In Thornton the Court said that the private dry sand owners have no right to interfere with the public access to the dry sand area through the construction of fences or other obstacles.

Here the plaintiffs propose to construct a sea wall, approximately 100

feet in length, and then backfill that sea wall that would have the effect of eliminating 12,500 square feet, approximately, of dry sand area.

THE COURT: You say "have the effect of eliminating." Why?

MR. REYNOLDS: Because the public would not have access to that area once the sea wall were built and it was backfilled.

THE COURT: Well, wouldn't that depend on how they build it?

MR. REYNOLDS: Well, that was their intent was to eliminate --

THE COURT: He confirms that it doesn't it, in effect, that what he's seeking is no crossover.

MR. REYNOLDS: Right. I don't think they were planning --

THE COURT: Right, when you say you can't build a sea wall that preserves the access, I just don't feel that's right.

MR. REYNOLDS: Oh, you could, but I don't think they were planning on any stairs, Your Honor, that would go up the sea wall that would permit the public to sunbathe on the top of their sea wall.

THE COURT: The parties are in agreement that this is not designed to build a public sandbox?

MR. REYNOLDS: That's correct. This is intended to build a 30-unit motel.

Just to put this in perspective, we're talking roughly about one and a half times the size of a standard city lot,

12,500 square feet.

THE COURT: You're assuming that the sea wall is going to be entirely constructed within the dry sand area.

MR. REYNOLDS: That was agreed, yes, Your Honor. And that was evidence from that -- from -- the parties will all admit that it's also in evidence as a result of attachments to the complaint. At least for purposes of the motion to dismiss.

I don't think there's any question that a sea wall of that size with that kind of an effect is an obstacle that would interfere with the public's right to the dry sand area within the meaning of Thornton. There's simply no expanded meaning reading to the Thornton decision

to reach the result that the Court of Appeals reached in this case. It's clearly within the statement that Thornton made.

If anything, we think that plaintiffs' real argument here is that Thornton should be narrowed, not that the Court of Appeals expanded it, but that the Thornton should be narrowed so as not to apply if the effect of applying Thornton is to deprive a dry sand owner of all economically beneficial use of his property. In other words, instead of a flat prohibition on a dry sand owner's ability to interfere, that prohibition should only exist provided the dry sand owner is able to use the property for some economically beneficial use. So there

[End Side 1, Tape 1]... but this Court narrow the reach of Thornton.

We have several responses to that argument. First of all, there's no rule of property law that we're aware of that says a servient estate is burdened by an easement is entitled to retain some economically beneficial use with respect to the easement or with respect to the servient estate. In other words, the owner of the servient estate cannot alter the condition of that servient estate once the easement is created if to do so interferes with the exercise of the easement right.

In this case, the easement right was created when the lot at issue was bare of development. And what that principle,

as we understand it, means is that the servient estate is not entitled to develop the property in a way that interferes with the easement. I'm not aware of any cases that say that is not the law.

So to the extent that Thornton basically says that by saying there's no interference with the right of the easement by creating obstacles or other kinds of structures, it's consistent with general principles of property law that govern easements.

Secondly, we submit that there's no fundamental unfairness that's present in applying Thornton as it's stated. I mean, to say that a private dry sand owner is not in a position to be able to develop their property because of the acquisition

of an easement by the public through the application of the state's principle of property law is certainly no more unfair than to say that a person can lose all interest in their property through the principles of adverse possession. Concededly here, the owner who has a piece of property that may have no economically beneficial use may not be in as good a position as someone who would like to be able to or are in the position to be able to develop their property, but I submit they're still in a position better than someone who has had their property taken away from them entirely by the principle of adverse possession.

THE COURT: Mr. Reynolds, that actually takes my thoughts back to where

Justice Gillette left off, and that is you talk about acquiring an easement. In States v. Wenn, was the easement acquired and how? I take it your basic point to be that there's no taking because they never had what is claimed was taken, or they did not have at the time of these events, what they're alleging has been taken. When did they stop having it?

MR. REYNOLDS: Well, the principle -- I know Mr. McMurry made some reference to Wenn -- I mean the territorial government could not patent -- issue patents for land and titles. Well, the state doesn't -- until the state acquired the land from the federal government, and only some of the land -- Section 16 and 36 in every township -- the

state had no ability to issue title to land anyway. We call it -- they were clearless is what the state did, but the federal government issued the patents to the land that were required by Oregonians unless they got it through the state as part of the school lands, the state's school lands.

I'm not sure -- Mr. McMurry says the federal government didn't start doing that until 1993 (sic). I'm not aware that that's when --

THE COURT: 1893.

MR. REYNOLDS: 1893. I'm not aware that that's when patents started being issued. But I don't think that matters because the point here is that we had a principle that we brought with us from the

common law that said that people can lose whatever interest they can acquire in property through application of a doctrine of custom, and that is a custom by -- an easement by custom. Easement by custom is different from easement by prescription only in the sense it refers to a place, and it's held by innumerable people, but it refers to a place as opposed to a prescriptive easement which is held by individuals, an individual or individuals, with respect to a place.

But that principle is part of the property law regardless of when people started acquiring their property. We submit it doesn't make any difference when people started acquiring title to their land. That principle of property law was

there in place and in essence burdened people's title when they acquired the property.

The same is true with respect to prescriptive easement. Under Mr. McMurry's theory, I would assume, no person could lose title by prescriptive easement either. Because it wasn't --

THE COURT: At least not with respect to the government.

MR. REYNOLDS: And I don't believe that's the law.

THE COURT: I notice that Mr. McMurry relied expressly on a congressional act of 1850, and I know that there are additional amendments to the acts that encourage homesteading and development of all of the west, some

(indiscernible) some others. But 1850's not the end of the story. It's certainly not the end of the story before 1870 which is when chain of title shows here as (indiscernible). That's all up in the air.

Your position is there as a principle in effect that had, by the time these people bought in '57 -- in 1957, a principle in effect which had ripened into a general public right to cross this sand by the time they bought it?

MR. REYNOLDS: The principle was in effect when title was acquired because it came from the common law. The principle that people -- that the public could acquire an easement through the long and continuous usage of the property, that was

in effect.

Prior to 1957, I think, under the Thornton, unless this Court is going to go back and reanalyze the basis for Thornton, under the Thornton decision, that easement, by custom, had been acquired by the public long before, at least as to the dry sand area that was not developed yet. I mean, the easement existed with respect to the entire dry sand area; it may be that some people, through development, encroached on that easement. It may be that they adversely possessed it back and took it back away from the public and no one objected for a period of time. And so at some point it becomes too late to object. I mean, you can gain easements and lose easements through use and through

nonuse.

But the point here is the principle was in effect. The principle of state property law was in effect. That is the principle that the state court applied in Thornton.

In reference to that, coming back to --

THE COURT: You talked about losing an easement if the people had once gained it. This is just an observation: If people seem to be the same as the sovereign in Oregon, which today (indiscernible) the same than others, but anyway, people seem to be the same as the sovereign in Oregon, and if the statute, adverse possession, doesn't run against the sovereign, then once the people

acquire the easement they wouldn't have lost it, would they?

MR. REYNOLDS: Well, I mean, they wouldn't lose it, but there may be encroachments on that that would prevent them from being able to reassert their right to the easement. For example, if someone in 1917 or 1920 built out onto the dry sand area and no citizens complained, the state didn't complain, and it existed there for 10 or 15 or 20 years, I don't think the state or the public could come back at that point and say -- and sue and say, "You need to tear down your building because it interferes with my -- with the public's easement."

I think the principle works both ways, but we're not talking here about

tearing down anything. We're talking about someone attempting to exercise their development rights with respect to the dry sand area where the easement does exist.

THE COURT: Mr. Reynolds, I can understand if he only wants a limited amount of beach.

THE COURT: Mr. Reynolds, is the principle you took at the outset with respect to the alleged inconsistency between Thornton v. Hay and the Beach Bill involve the proposition that this easement existing in favor of the public in general, not in favor of specific individuals, it is an easement which may be enforced by, protected by or relinquished by the legislature?

MR. REYNOLDS: That's correct.

THE COURT: Now, there's a hook in this question.

MR. REYNOLDS: I'm not surprised.

THE COURT: Just trying to let you know. If the legislature could give away the right which was recognized in Thornton v. Hay -- and I assume for purposes of this discussion that you're correct in your argument that the right has always existed. Thornton v. Hay didn't create something; it merely recognized something. But if that right is subject to being given away by the legislature through the democratic and legislative process, the right could be given away completely, could it not? That is, the legislature could decide that for public policy

reasons it was going to give up the public's right to beach access at particular places or would authorize it to be done for purposes of gaining revenue or for some other reason?

MR. REYNOLDS: I think -- I think the state would be, and I think the state has asserted the position to do that just like it could sell or give away any of the other state property with the exception of the lands that we hold under the public trust doctrine.

THE COURT: If it could do -- if the state could do that, and if an individual acquired -- if the original title holder acquired title from the state -- I'm not suggesting that's true in this case -- but if the individual title holder

acquired title from the state, how is one to know whether the state sold the whole bundle of rights or not?

MR. REYNOLDS: I think the answer to that is the property, the title here was not acquired from the state. The title here is acquired from the federal government through patent. That's how all land in Oregon, except the land that comes to the state through the admissions act and any other specific grants, is acquired.

THE COURT: That's my understanding too, but there's still a hook in the question.

MR. REYNOLDS: Okay.

THE COURT: If title, instead, was acquired originally from a federal patent,

did the federal government have the right to give away this public easement?

MR. REYNOLDS: Assuming it was in existence at the time?

THE COURT: Well, you have to assume it was in existence at the time.

MR. REYNOLDS: I don't believe I have to assume -- the easement was in existence at the time. The principle of property law that permitted the acquisition of the easement had to be in existence at the time. That principle was in effect. I'm not sure when the easement was acquired; sometime probably during the late 1800's, early 1900's. At least that's -- I don't think Thornton was saying in its discussion of all of the activity that occurred on the ocean

beaches -- was talking about pre-1893. It was talking about the activity that occurred during the late 1800's, early 1900's.

THE COURT: Well, I'm not sure that's the only way to read Thornton. That is, when there's a discussion of the fact that the beach was used as a highway by --

MR. REYNOLDS: That's true. But I think --

THE COURT: -- Native Americans prior to the time that the settlers even came here, there's a message here with respect to just how far back custom goes.

MR. REYNOLDS: But I think it's talking about a period of 60 plus years in which that activity occurred.

THE COURT: So your position, then, is that if the public had a right -- if the doctrine of custom would have caused the recognition in the right of the public to use the beach at the time the federal government owned the property, then the federal government either didn't give that right away when it issued its patent, or, if it did, then custom would permit the recognition of the reacquisition by the public of that right due to later activity --

MR. REYNOLDS: And I would submit the federal government is not in a position to give away the state's right. Because my understanding, once the federal government parts with title to land to the state, the governing of easements and

acquisitions and property rights is purely a matter of state property law. The Supreme Court recently reaffirmed that principle, I think, in a case we haven't cited in our brief, but Sierra Arizona Land and Cattle Company case.

THE COURT: There's no question about --

MR. REYNOLDS: Right.

THE COURT: There's no question about state law government -- state law governing title questions once the government has issued its patent, once the federal government has parted with title. But the question is what was transferred at the time of the parting of title.

But your position is that it doesn't matter --

MR. REYNOLDS: That's right, it doesn't matter.

THE COURT: -- because even if the federal government could have given it away, it was reacquired --

MR. REYNOLDS: That's right.

THE COURT: -- well before the time that Mr. McMurry's clients --

MR. REYNOLDS: And I think that's how I interpret Thornton.

THE COURT: Okay, one more question. Even if Mr. McMurry's clients had the right that they assert, they have known at least since Thornton v. Hay and the Beach Bill that there was a public declaration of a contrary right, have they not?

MR. REYNOLDS: They have known since the beach -- well, yes.

THE COURT: Doctrine of laches have anything to do with this?

MR. REYNOLDS: Well, we talked about that. We didn't assert that as a basis below, so we did not feel it was enough that we were in a position on appeal to assert --

THE COURT: Why not? You won?

THE COURT: Because laches is an affirmative defense --

MR. REYNOLDS: We think -- I mean, it's a long and complicated --

THE COURT: You're not there yet.

MR. REYNOLDS: We didn't assert it. And I'm not saying that we've waived the right to assert it if --

THE COURT: Well, you got the complaint dismissed. If it's an affirmative defense you're not that far along there.

MR. REYNOLDS: Yeah, that's right.

THE COURT: But it is a matter to be considered down the road defensively.

MR. REYNOLDS: I hope I've addressed the Lucas issue and why this isn't a taking. I mean, Lucas carves out an exception and says where you've applied existing principles of property law and you reach a particular result that's not a taking. It's not a taking if it's prescriptive easement; it's not a taking here.

THE COURT: Thank you, Mr. Reynolds.

Mr. McMurry.

MR. McMURRY: Thank you. I want to clarify a little confusion with respect to this ABDO zone and dunes and that sort of thing. Goal 18, by a 1985 amendment, explicitly applies not only to dunes but to beaches. The word "beaches" was inserted in 1985. So Goal 18 is an absolute bar to dry sand, to dunes, to anything without respect in effect to the zone line of the Beach Bill.

THE COURT: The exception process was never applied to it? There's no way around it?

MR. McMURRY: Oh, yeah, you can get an exemption to put up a temporary wooden walk, a temporary sand fence, a bonsai tree, but nothing permanent. And that's a

fair reading of it. It says, "Thou shalt not build," period.

Now, I want to come back to Justice Graber's point. What is this thing? In the McDonald v. Halvorson case Judge Lindy asked the state, "What is this thing, this right to walk? Is it an easement, is it a grant? What is it?" And no one could really put their finger on it.

If there was a well-founded -- well-founded -- doctrine of custom that gave people rights to land that was otherwise owned by private or public institution it was never enunciated in the state of Oregon. In fact, Thornton acknowledged that it had not been enunciated. Therefore it was a new case of first impression and only one case was

cited, a New Hampshire case, as having applied custom at that time in 1969.

THE COURT: Mr. McMurry, what can you possibly be claiming for this? No right is recognized until it's recognized. That's tautology. That doesn't help us very much.

MR. McMURRY: But if it's a case of new impression, if it's a case of new impression, then the question of retrospective and retroactive application has some --

THE COURT: Forgive me, but it wasn't until, I think, State v. Delgado -- no, there was a case earlier than that -- but it wasn't until the Delgado group of cases that we recognized that citizens of the state of Oregon have a right to

carry a gun, but they've had the right since 1859. It's not a case of retrospective application at all. It's a question of this is the right and it's always been the right.

MR. McMURRY: Well --

THE COURT: How is this different than that?

MR. McMURRY: Well, it seems to me that what Lucas is talking about when it says the state cannot by ipse dixit take what is private property and make it public.

THE COURT: What rights did your client have in this property, say, in 1975?

MR. McMURRY: In 197 --

THE COURT: Did they have a full bundle of sticks?

MR. McMURRY: Yes.

THE COURT: In other words, Thornton and the Beach Bill has no effect upon your clients' rights in this --

MR. McMURRY: They had the right to apply for a building permit subject to the Beach Bill's regulation and going through the control that the Beach Bill does apply; that's what they had. And that's what we say we still have. It's never been repealed, the 655 statute. In fact --

THE COURT: Is your answer to Justice Peterson's question that you rely on the ability to get a permit to develop under the 1969 law?

MR. McMURRY: Under the 1967 Beach Bill, that is correct. We rely on the Beach Bill. We're opposing Goal 18 which is the absolute prohibition of any development. The Beach Bill gives us the right, subject to reasonable regulation to develop our property. That's never been quite understood by the press.

THE COURT: Well, and I'm trying to be sure I understand your position of that, even though I'm just building on Justice Peterson's question really. So that means you agree that whatever regulation the Beach Bill imposed is a regulation imposed on you?

MR. McMURRY: Yes.

THE COURT: And their ownership?

MR. McMURRY: Yes.

THE COURT: So it's the additional regulation --

MR. McMURRY: It's the prohibition against any building that we're offended by.

THE COURT: And that didn't come about until '85?

MR. McMURRY: That's right.

THE COURT: Thank you.

THE COURT: Mr. McMurry, I understood you to state in your opening argument that you are not asking this Court to overrule Thornton v. Hay; is that correct?

MR. McMURRY: That is absolutely correct.

THE COURT: Did I understand you just a moment ago to argue that Thornton

v. Hay does not apply to your client because your client acquired title a decade before the Thornton decision was rendered?

MR. McMURRY: If it's to be as broadly read as the Attorney General has convinced the Court of Appeals, that it's an absolute bar and prohibition, then it doesn't apply.

THE COURT: To your client.

MR. McMURRY: To our client, because we believe that to be a retroactive --

THE COURT: Because you acquired title before the decision.

MR. McMURRY: Exactly. But I don't believe that's the rational understanding of Thornton or else you'd have to repeal

the component, the development component of the Beach Bill. I'm sorry, my time is up. Thank you.

THE COURT: Thank you, Mr. McMurry.

(Proceedings concluded.)

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